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A

DIVORCE AND PROBATE MANUAL:

DESIGNED FOR LAW STUDENTS.

BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW,

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LONDON:

REEVES AND TURNER,

100, CHANCERY LANE AND CAREY STREET,

Law Booksellers and Publishers.

1886

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

This little Work

IS

DEDICATED

TO

ALL STUDENTS OF THE LAW.

PREFACE.

THE object of this little Manual is to place before the students of both branches of the profession of the law, in a rudimentary, chronological, simple and inexpensive form, the Principles and Practice of English Divorce and Probate Law.

The subjects are dealt with more fully in the larger works upon them by

THE AUTHOR.

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ABBREVIATIONS.

C. B.—Contentious Business.
C. F.—Common Form.
C. P. A.—Court of Probate Act.
Curt.—Curteis' E. R.
D. & S.—Deane & Swabey.
Hagg.—Haggard's E. R.
In the goods of Smith, e.g. is cited *Smith;* and *Smith* v. *Smith* as *Smith* v. *S.*
Jur.—Jurist.
L. J.—Law Journal.
Law Reports, Probate and Divorce, are cited P. & D.
L. T., N. S.—Law Times.
Non-C. B.—Non-Contentious Business.
N. C.—Notes of Cases.
P. R. and D. R.—Principal and District Registries.
Rob. or Robert.—Robertson's E. R.
R. S. C.—Rules of the Supreme Court.
W. N.—Weekly Notes.
W. R.—Weekly Reporter.

DIVORCE LAW.

CHAPTER I.

ORIGIN OF THE DIVORCE DIVISION.

Divorce Jurisdiction since 1873.—All jurisdiction in divorce and matrimonial causes is now vested in the Probate, Divorce and Admiralty Division of the High Court of Justice.

Divorce Jurisdiction from 1857 *to* 1873.—Prior to the creation of the High Court of Justice in 1873, divorce jurisdiction was vested in the Divorce Court, a Court established in the year 1857, in accordance with the provisions of the Matrimonial Causes Act of that year.

Divorce Jurisdiction before 1857.—Till 1857 the Ecclesiastical Courts exercised jurisdiction over all matrimonial suits between husband and wife, *except those for dissolution of the marriage.*

Bills for Divorce.—In suits for dissolution of the marriage the remedy *was* by a bill in parliament, a proceeding costly even to the affluent, and to the poor impossible.

Establishment of the Divorce Court.—The legislature, in the year 1857, established a Court competent to deal with all matrimonial proceedings at a uniform and moderate expense, thus relieving the Ecclesiastical Courts of this branch of their jurisdiction, and abo-

lishing the cumbrous and costly bill for divorce in parliament.

Amalgamation of all Divorce, Probate and Admiralty Procedure in 1873.—The Divorce Court of 1857 was, in 1873, amalgamated with other Courts in the Probate, Divorce and Admiralty Division of the High Court of Justice.

Matters Matrimonial.—The matters over which the Divorce Division has jurisdiction are, suits for—

(i) Dissolution of marriage. (M. C. A. 1857, ss. 27 to 31 inclusive; see *post*, p. 11.)

(ii) Nullity of marriage. (*Ibid.*, s. 6; see *post*, p. 22.)

(iii) Judicial separation. (*Ibid.*, s. 7; see *post*, p. 25.)

(iv) Restitution of conjugal rights. (*Ibid.*, s. 6, and M. C. A. 1884; see *post*, p. 26.)

(v) Jactitation of marriage. (See *post*, p. 28.)

And also the following matters incidental to and arising out of the above proceedings:

(vi) The allotment of alimony and maintenance, according to the circumstances, in the above suits. (See *post*, p. 29; M. C. A. 1857, ss. 17, 24, 32; M. C. A. 1866, ss. 1, 2; and M. C. A. 1884, ss. 2, 3, 4, 6.)

(vii) Custody of children and access to them. (M. C. A. 1857, s. 35; M. C. A. 1859, s. 4; see *post*, p. 29.)

(viii) The application of damages recovered from an adulterer. (M. C. A. 1857, s. 33; see *post*, p. 31.)

(ix) The settlement of property of the parties in certain cases. (M. C. A. 1857, s. 45; and M. C. A. 1859, s. 5; see *post*, p. 32.)

(x) The protection of the wife's property in certain cases. (M. C. A. 1857, ss. 21, 25; M. C. A. 1858, ss. 6, 7; see *post*, p. 32.)

(xi) The reversal of the decree of judicial separation (M. C. A. 1857, s. 23), and of the decree *nisi* for a divorce (M. C. A. 1860, s. 7), and of a similar decree of nullity of marriage (M. C. A. 1873, s. 1).

Jurisdiction of the Divorce Division.

The Divorce Acts apply in the matter of jurisdiction to England. (*Le Sueur* v. *Le S.*, 45 L. J., Mat. 74.)

England, in divorce suits, signifies England to Berwick-on-Tweed, and Wales. (*Yelverton* v. *Y.*, 1 S. & T. 586.)

The first important questions necessarily arising in matrimonial suits relate to—

(i) The marriage;
(ii) The place of marriage (*locus contractûs*);
(iii) The husband's domicile.

Materiality of Allegiance questioned.—Allegiance has been stated to be a material question in *matrimonial suits*, but its importance is not manifest upon consulting recent authorities.

In *Deck* v. *D.* (29 L. J., Mat. 129; 2 S. & T. 90, 1860), allegiance was treated as material. That case was decided by the Divorce Court soon after its constitution. *Udney* v. *U.*, which is in direct conflict with it, and distinctly explains the effect of allegiance and domicile, was an appeal case decided by the House of Lords nearly ten years later. Still later, in 1878, Lord Justice Brett, reviewing the decision in *Deck* v. *Deck*, dissented from it (*Niboyet* v. *N.*, 4 P. D. 18): and subsequent decisions do not support it.

Allegiance explained.—Allegiance regulates a person's political status, and is the public duty which he owes to the State of which he is a subject. A breach of that

duty renders him amenable to the criminal law only. (*Udney* v. *U.*, 1 Scotch Appeals, 452.)

Illustration.—An English subject married in England. His wife obtained a divorce in Scotland. He married again, treating the Scotch divorce as valid. It was held invalid, because the Scotch Court had no jurisdiction. His English marriage not having been dissolved he had committed a breach of public duty, or of allegiance, in contracting a bigamous marriage, for which he became liable to criminal proceedings for the crime of bigamy. (*Lolley's case*, Russell & Ryan, 237.)

Bigamy.

Bigamy is of two kinds, criminal and civil.

Criminal Bigamy.—Criminal bigamy renders the offender liable to a prosecution. But there are defences to the charge. (See Archbold, "Bigamy.")

With civil bigamy the Divorce Division has alone to do.

Civil Bigamy.—Civil bigamy admits of no answer, and entitles the parties injured by it to certain remedies.

If it be coupled with adultery, the two offences entitle the first wife to a dissolution. (See *post*, p. 11.)

Bigamy also entitles the second wife to a decree of nullity of marriage. (*Conway* v. *Beazley*, 3 Hag. E. 639.)

The Locus delicti.—The *locus delicti*, or the place where the matrimonial offence occurred, has also been treated as material. But in one case only has it been even dwelt upon (*Niboyet* v. *N.*, 4 P. D. 1). The authorities against that decision, upon this point, are almost without number.

In addition, it is stated by a weighty authority upon

"Marriage and Divorce" (Bishop, § 740), that "The place where the offence was committed, whether in the country in which the suit is brought, or a foreign country, is quite immaterial."

Illustrations.—An English husband obtained a divorce on the ground of his wife's adultery. The adultery took place *in Scotland*. (*Wilson* v. *W.*, 2 P. & D. 435.)

A wife obtained a divorce in England on the ground of bigamy and adultery. The bigamy and adultery took place in America. (*Deck* v. *D.*, 2 S. & T. 90; 29 L. J., Mat. 129.)

A wife obtained a divorce on the ground of adultery and cruelty. The adultery took place in Ireland. (*Bond* v. *B.*, 2 S. & T. 93.)

In each case the *locus delicti* was beyond the jurisdiction of the Court, and being so it matters not how much or little beyond, whether at Paris or the Antipodes. These cases can be added to indefinitely upon this question.

The Marriage.—The marriage is the first and most important question in matrimonial proceedings, because every subsequent matrimonial matter depends upon its validity.

Marriage is "the conjunction of man and woman vowing to live inseparably together till death." (Justinian, bk. i. tit. 9, s. 1.) In English law it is a civil contract between man and woman to live inseparably and *exclusively* together till death.

English and Foreign Marriages.

Marriages must take place in England or abroad.

Marriages in England are here called English marriages.

Marriages abroad are here called foreign marriages.

English Marriages.—English marriages must be between *capable parties*, and the *form*, *place*, and *time*, of the ceremony must be according to English law.

Capable Parties.

Capable parties are those who labour under no civil disabilities. (1 Blackstone, 434.)

Civil Disabilities.

Civil disabilities are four in number—

A previous marriage;
Insanity;
Relationship within the prohibited degrees of consanguinity or affinity;
Minority.

A previous Marriage.—Where a party to a marriage is proved to have been a party to a previous existing marriage, such marriage is a civil disability, which precludes him from marrying again during its continuance. (*R.* v. *Harborne*, 2 Ad. & El. 540; *Conway* v. *Beazley*, 3 Hagg. E. 639.)

Insanity.—Insanity is an absence of mind, and creates an inability to consent to the marriage contract. (See also Stephen's, Comm. 7th ed. vol. ii. 241.)

Relationship within the prohibited Degrees of Consanguinity or Affinity.—Parties who are related within the prohibited degrees of consanguinity or affinity labour under the civil disability from contracting marriage created by such relationship. (Stephen's Commentaries, 7th ed. vol. ii. 242. See *post*, NULLITY OF MARRIAGE; VOID MARRIAGES.)

Minority.—Minors marrying without the consent of

their parents or guardians, or, if wards of court, without the consent of the Lord Chancellor, contract a marriage voidable at their option on majority. (4 Geo. 4, c. 76, ss. 16, 17; Coke, Litt. 79a, 79b; *R.* v. *Birmingham*, 8 B. & C. 35.)

The Form of Marriage.

The form of marriage must be either—

By banns;
By common licence;
By special licence;
By registrar's certificate:
With licence;
Without licence.

(4 Geo. 4, c. 76; and 6 & 7 Will. 4, c. 85.)

Marriage by Banns.—The marriage ceremony must be performed by a clergyman, in a church, between 8 and 12 a.m., and attested by two other witnesses, and after the publication of banns on three successive Sundays previously. (4 Geo. 4, c. 76; and 6 & 7 Will. 4, c. 85, s. 2.)

Marriage by Licence.—Marriage by licence is of two kinds—

By common licence;
By special licence.

Marriage by Common Licence.—A common licence is that of the ordinary of the place of marriage, or his surrogate. (10 & 11 Vict. c. 98, ss. 5, 10.)

Marriage by Special Licence.—A special licence is that of the Archbishop of Canterbury. (20 Hen. 8, c. 21; 4 Geo. 4, c. 76, ss. 10, 20; 6 & 7 Will. 4, c. 85, s. 1.)

The Place of Marriage.—The place of marriage, if the

marriage be by licence, may be any registered place of worship, registered also for marriages (6 & 7 Will. 4, c. 85, s. 11; 7 Will. 4 & 1 Vict. c. 22, s. 35); and on change of the place of worship, see 6 & 7 Will. 4, c. 85, s. 19.

By Registrar's Certificate.—Marriage by registrar's certificate or civil ceremony, with or without a licence, must be according to the requirements of 6 & 7 Will. 4, c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119; and 23 Vict. c. 18.

The district registrar of births and deaths may register marriages. (6 & 7 Will. 4, c. 85, s. 3.)

Consent of Parents.—Consent must be obtained to the marriage of minors by parents or persons *in loco parentis*. (19 & 20 Vict. c. 119, s. 2.)

The marriage must be between 8 and 12 a.m. with open doors, according to the form and ceremony chosen by the parties, and before the district registrar and two or more credible witnesses, a certain declaration specified in the Act applying thereto being made.

Licences.—Questions relating to licences are decided by applying to them the Acts of Parliament under which the licences are issued, or in accordance with the regulations of which the issue should be. Their legality is not tested in the Divorce Division. (M. C. A. 1857, ss. 2, 6.)

Foreign Marriages—Proof.—Foreign marriages must be proved to have been performed according to the law of the country in which they were celebrated. (*Simonin* v. *Mallac*, 2 S. & T. 77; 29 L. J., Mat. 105.)

Illustration.—Domiciled English subjects, within the degrees of relationship prohibited by English law, but

not by Danish law, married in Denmark. But on suit in England, the marriage was held null and void. (*Brook* v. *B.*, 3 Sma. & G. 481.)

Foreign marriages contrary to the laws of the country of the domicile of the parties are held invalid. (See *post*, NULLITY OF MARRIAGE; VOID MARRIAGES.)

Lex loci contractûs.—The place of the marriage, if it be abroad, is material, because the validity of the ceremony of marriage depends upon its being in accordance with the law of the place where it was performed, namely, with the *lex loci.* (*Simonin* v. *Mallac*, 29 L. J., Mat. 97; *Herbert* v. *H.*, 2 Hag. C. 271.)

Illustration. — A marriage in Denmark between English parties who are within the degrees of relationship prohibited by English law, but permitted in Denmark, is a marriage valid, *lege loci contractûs*, but invalid, *lege domicilii.* (*Brook* v. *B.*, 3 Sma. & G. 481.) In such a case the *lex domicilii* prevails.

The Law of the Domicile.—The law of the place of domicile regulates the civil consequences of the marriage. (*Brook* v. *B.*, 3 Sma. & G. 481; *Conway* v. *Beazley*, 3 Hagg. 639.)

Law of Domicile overrides Law of Place of Marriage.—When the law of domicile is in conflict with the law of the place of contract, the former prevails (*Conway* v. *Beazley*, 3 Hagg. 639; *Brook* v. *B.*, 3 Sma. & G. 481); because the former regulates the civil consequences of the marriage, the latter the validity of the ceremony only. (*Munro* v. *M.*, 7 Cl. & Fin. 872; *Warrender* v. *W.*, 2 Cl. & Fin. 531.)

Domicile is of three kinds: domicile of origin; domicile of law; domicile of choice. (See Phillimore and Dicey on Domicile.)

Domicile of Origin.—Domicile of origin or birth is the domicile of every male adult until it is changed. (Phillimore and Dicey on Domicile, *Udney* v. *U.*, 1 Scotch Appeals, 452.)

Domicile of Choice.—The domicile of choice is the domicile which a person acquires by residence, with an intention to constitute it his permanent home. (*Ibid.*)

Domicile of Law.—Domicile of law is the domicile of the wife on her marriage, and also that of the children of the family under twenty-one years of age. (*Ibid.*)

Domicile.—Domicile regulates a person's *civil status and rights only* as a citizen of the state in which he is domiciled. (*Ibid.*)

Illustration.—A domiciled English subject married a wife in England. She obtained a divorce from him in Scotland. He then married again. His first marriage could not, by the law of his domicile, be dissolved elsewhere; he could not, therefore, legally contract a second marriage. His second wife obtained a decree of nullity of marriage on the ground of bigamy. (*Conway* v. *Beazley*, 3 Hagg. E. R. 639.)

The Husband's Domicile.—The husband's domicile is a question of fact. The effect of that fact when found is a question of law.

The Wife's Domicile.—The wife's domicile follows that of her husband (Phillimore and Dicey on Domicile); for modification of this rule see *Niboyet* v. *N.*, 4 P. D. 1.

CHAPTER II.

DISSOLUTION OF THE MARRIAGE.

The grounds upon which husband and wife can severally obtain a divorce differ materially. (M. C. A. 1857, ss. 27—31 inclusive.)

The Husband's grounds.—The husband must prove the adultery of his wife to obtain a divorce; no other ground will suffice. (M. C. A. 1857, s. 27.)

The Wife's grounds.—The wife cannot proceed for a divorce on her husband's adultery alone; she must establish either of the following grounds:—

(i) Incestuous adultery;
(ii) Bigamy with adultery;
(iii) Rape;
(iv) Sodomy or bestiality;
(v) Adultery and cruelty;
(vi) Adultery and desertion without reasonable excuse for two years or upwards. (M. C. A. 1857, s. 27.)

Adultery.—Adultery is the act of sexual intercourse between two persons, one, or each, of whom is married to another; or, sufficiently to satisfy the requirements of the Divorce Acts, it is the act of wrongful sexual intercourse by either husband or wife.

Incestuous Adultery.—Incestuous adultery is adultery by the husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage, by

reason of her being within the prohibited degrees of consanguinity or affinity. (M. C. A. 1857, s. 27.)

These degrees are set out in the "Table of Kindred and Affinity," wherein whosoever are related are forbidden in Scripture and our laws to marry together. The table appears in the Book of Common Prayer of the Church of England.

Bigamy with Adultery.—Bigamy, as defined by the Act, is "the marriage of any person being married to any other person during the life of the former husband or wife; whether the second marriage shall have taken place within the dominions of her Majesty or elsewhere." (Sect. 27.)

Bigamy with adultery is bigamy with the person with whom the adultery is committed.

Rape.—Rape is the act of having carnal knowledge of a woman violently and against her will. (See Archbold's Criminal Pleading.)

—*Proof.*—To prove the allegation of rape such evidence is requisite as would substantiate the criminal charge.

Sodomy.—Sodomy is the unnatural carnal knowledge of any person. (See Archbold's Criminal Pleading, "Sodomy.")

Bestiality is the unnatural carnal knowledge of any animal. (*Ibid.*, "Bestiality.")

—*Proof.*—To prove the allegation of sodomy or bestiality such evidence is requisite as would substantiate the criminal charge.

Adultery and Cruelty.—Adultery and cruelty are "adultery coupled with such cruelty as without adultery would have entitled the party to a divorce *a mensâ et*

thoro;" or, since 1857, to a judicial separation. (M.C.A. 1857, s. 7.)

Adultery has been already dealt with, *ante*, p. 11.

Cruelty.—The cruelty set up must be such as to endanger the life, limb, or health of the complainant. It must be proved to have actually taken place, or the party setting it up must have an honest apprehension that it will take place if not prevented, an apprehension founded on previous threats or unsuccessful attempts to inflict it under circumstances showing a danger of its recurrence if cohabitation continued.

Illustration.—A man may strike or shoot at his wife without injuring her. The next attempt might kill her. She is entitled if in fear of a repetition of such violence to protection from it. (*D'Aguilar* v. *D'A.*, 1 Hagg. E. R. Supp. 779.)

Cruelty is of various kinds, and not always Personal Violence.—Cruelty is of various kinds, and does not necessarily include personal violence.

That which would be cruelty to a person in a high rank of life might not be so to a person in a humbler one.

"A wife brought up as a gentlewoman would suffer in her health and constitution, nay, even her life might be endangered, by a mode of living which would be comfortable to a female in a different grade of life." (*Dysart* v. *D.*, 3 N. C. 340.)

The temperament of the parties too must be considered. Coldness and indifference, constant and studied indignities to a lady of acute sensibility, may become cruelty, because of the injury to her health. (*Sarkiss* v. *S.*, June 27, 1884.)

There are other forms of cruelty somewhat different from the above.

Illustrations.—Compelling the wife to lead the life of a prostitute is cruelty.

Communicating a venereal disease to her knowingly is cruelty. (*Boardman* v. *B.*, 1 P. & D. 235 (1866); *Brown* v. *B.*, 1 P. & D. 46; *Cobbett* v. *C.*, 1 Curt. 678.)

Communicating a cutaneous disease is not cruelty. (*Chesnutt* v. *C.*, 1 E. & A. 205 (1854).)

Spitting on the wife is cruelty. (*D'Aguilar* v. *D'A.*, 1 Hagg. E. R. Supp. 776 (1794).)

Delirium does not alter the nature of the act. (*Marsh* v. *M.*, 28 L. J., Mat. 13 (1858).)

Peril is the ground for the remedy, motives do not affect the question. (*Holden* v. *H.*, 1 Hagg. C. 458 (1810); *Martin* v. *M.*, 29 L. J., Mat. 106.)

A wife may be violent to her husband. In defending himself he may be tempted to retaliate with violence. In such a case the Court has found the wife guilty of cruelty. (*Forth* v. *F.*, 36 L. J., Mat. 122; *Furlonger* v. *F.*, 5 N. C. 425.)

Constructive Cruelty.—Cruelty to a child of the marriage by one of the parents, which so wounds the feelings of the other as to be dangerous to health, will warrant the Court's intervention. (*Birch* v. *B.*, 42 L. J., Mat. 24.)

Adultery coupled with Desertion, &c.

Adultery coupled with desertion without reasonable excuse for two years or upwards.

Desertion.—Desertion is the wilful absence from cohabitation of one of the contracting parties without the consent of the other. (*Thompson* v. *T.*, 27 L. J., Mat. 65; *Graves* v. *G.*, 33 L. J., Mat. 70.)

Reasonable Excuse.—Reasonable excuse arises on the commission, by the party subsequently deserted, of a

matrimonial offence, such as cruelty or adultery. (*Yeatman* v. *Y.*, 1 P. & D. 489 (1868).)

Desertion, meaning of the Term.—Desertion must be without cause, and for two years and upwards. (M. C. A. 1857, s. 16.) Whether coupled with the words "without cause," or "without reasonable excuse," it always means the same thing. (*Yeatman* v. *Y.*, 1 P. & D. 489.)

Desertion in Suits for Judicial Separation.—Desertion when charged in a suit for judicial separation must be of two years' duration.

—*in Suits for Divorce.*—Desertion may be pleaded in answer to a suit for dissolution immediately after it took place. It might be the cause of the adultery complained of.

Illustration.—A gentleman married a prostitute. He had no means to support her. They separated by consent. She committed adultery. Her husband sued for a divorce. She pleaded desertion without effect. The Court granted him a decree. (*Proctor* v. *P. et al.*, 34 L. J., Mat. 99.)

Desertion, when excusable.—Conclusive evidence of gross improprieties by the wife constitute a reasonable excuse for separating from her. (*Haswell* v. *H.*, 29 L. J., Mat. 21.)

Deeds of Separation.

Deeds of separation, though not contemplated by the Matrimonial Causes Acts, nor the Ecclesiastical Courts, are now recognized in the Divorce Division, and are frequently resorted to, both to obviate litigation, and, when it has arisen, to close it. Hence, some knowledge of their effect in matrimonial suits is desirable.

A husband or wife who is a party to a deed of separation is bound by its terms. (*Marshall* v. *M.*, 5 P. D.; *Gandy* v. *G.*, 7 P. D.; *Besant* v. *Wood*, 12 Ch. D.) But any matrimonial offence subsequently committed, and not contemplated on the execution of the deed, entitles the party wronged to the legal remedy applicable to the case.

Dissolution—Defences.—The defences to a suit for dissolution consist of—

(i) Denial of the offences charged;
(ii) Connivance;
(iii) Condonation;
(iv) Collusion. (M. C. A. 1857, ss. 30, 31.)

Absolute Bars, why.—If either of these defences is established the petition fails, and hence they are called absolute bars.

There are also certain other defences, as follows:—

(v) The petitioner's adultery;
(vi) Unreasonable delay in presenting or prosecuting the petition;
(vii) Cruelty of the other party to the marriage;
(viii) Desertion, or wilful separation, from the other party before the adultery complained of, and without reasonable excuse;
(ix) Such wilful neglect, or misconduct, as has conduced to the adultery.

Discretionary Bars, why.—These defences, if established, give the Court a discretion in the exercise of its power. In other words, the Court is not bound to make a decree in the petitioner's favour if either of these defences is proved. Where the offence is of a serious character, the Court in the exercise of its discretion

refuses a decree. Hence these latter are called discretionary bars.

Denial of the Offences charged.

This class of answer to the petition needs no comment. Its sufficiency depends solely on the facts proved.

Connivance.—Connivance is a conspiracy between the parties to the suit that the act to be charged by the petitioner shall be committed by the respondent. It is an agreement between the parties for the respondent, to commit a matrimonial offence that the petitioner may obtain relief upon it. (*Boulting* v. *B.*, 3 S. & T. 335.)

Volenti non fit Injuria.—The phrase *volenti non fit injuria* explains the position of the conniving party. No wrong is done where he acquiesces in the conduct of the other party. (*Ibid.*)

Connivance at one Adultery is Connivance at all.—Connivance at adultery with one person is a defence to a charge of adultery with another. (*Lovering* v. *L.*, 3 Hagg. E. C. 85.)

Condonation.

Condonation is a blotting out of the offence charged, so as to restore the offending party to the position he occupied before the offence was committed. (*Keats* v. *K.* & *M.*, 28 L. J., Mat. 57.)

Complete Knowledge and Forgiveness are necessary.—In order to found it there must be a complete knowledge of the matrimonial offence, and a forgiveness subsequent to it. (*Turton* v. *T.*, 3 Hagg. 351.) A forgiveness with a full knowledge of all the circumstances. (*Peacock* v. *P.*, 27 L. J., Mat. 71.)

Condonation by Husband and Wife.—Condonation by the husband and wife are different in their effects.

A wife may condone her husband's conduct in the hope of his amendment. But his condonation of his wife's adultery might show insensibility to his own honour. (*Peacock* v. *P.*, 1 S. & T. 184.)

One matrimonial offence revives another condoned. Adultery revives cruelty; cruelty revives adultery (*Palmer* v. *P.*, 29 L. J., Mat. 124; *Dent* v. *D.*, 34 L. J., Mat. 118); and adultery revives desertion. (*Blandford* v. *B.*, 8 P. D. 19.)

Distinction between Condonation and Connivance.—Condonation is quite distinct from Connivance.

Condonation is forgiveness of a past offence with a due regard to the future. Connivance is an improper consent to the commission of a matrimonial offence. (*Lovering* v. *L.*, 3 Hagg. 86.)

Collusion.

If the Court finds that the petition is presented in collusion with either of the respondents it shall dismiss it. (M. C. A. 1857, s. 30.)

Collusion is an agreement between husband and wife, in a matrimonial suit, for the suppression of material facts from the knowledge of the Court. (*Hunt* v. *H. & W.*, 26 W. R. Dig. 79; 47 L. J., Mat. 22; 39 L. T., N. S. 45; *Bacon* v. *B. and another*, 25 W. R. 560.)

The material facts consist of an agreement between the parties, fraudulently suppressed from the knowledge of the Court, for one to commit, or appear to commit, a matrimonial offence, that the other may obtain a remedy as for a wrong. Wrong, of course, there is none. Therefore, the Court will not grant relief. Hence collusion is an absolute bar.

Intervention.—The suppression of material facts justifies intervention (23 & 24 Vict. c. 144, s. 7); but not withholding a decree, if the Court thinks the petitioner be entitled to it. (*Alexander* v. *A.*, 2 P. & D. 164.)

Grounds.—The grounds of intervention are two only—

Collusion.

Suppression of material facts.

Either party may intervene. (22 & 23 Vict. c. 144, s. 7.)

In practice the Queen's Proctor only does so on the ground of collusion, and in his official capacity. He must confine himself to collusion in suits for dissolution, but he may, as a member of the public, show cause against a decree *nisi*. (*Masters* v. *M.*, 34 L. J., Mat. 7.)

Intervention, though dealt with here, is usually after the decree *nisi*, because, till the hearing, material facts are not usually known to have been suppressed. (*Conradi* v. *C.*, 36 L. J., Mat. 68.)

The Queen's Proctor, or a member of the public, may intervene in a suit at any time before decree absolute (*Clements* v. *C.*, 33 L. J., Mat. 74), and oppose the decree. (*Bowen* v. *B.*, 3 S. & T. 530.)

Costs.—Intervention is on peril of costs if unsuccessful. (*Forster* v. *F.*, 3 S. & T. 151.)

Discretionary Bars.

Adultery.

Except under special circumstances of extenuation, the Court will not grant a divorce where the petitioner also has been guilty of adultery.

Illustrations.—A petitioner believing his wife to be dead married again. He afterwards discovered that she was living in adultery, and sued for divorce charging her with adultery. She answered charging him

with adultery. The Court acquitted him of intentional or wilful adultery, and granted him a divorce. (*Morgan* v. *M.*, 1 P. & D. 644.)

A husband married again after the decree *nisi* in his favour believing his marriage to be dissolved. Though this was not yet the case, the Court treated his conduct as innocent, and granted him a decree. (*Noble* v. *N.*, 1 P. & D. 691.)

A wife was compelled by her husband to lead a life of prostitution. The Court treated her adultery as enforced, and gave her a decree. (*Coleman* v. *C.*, 1 P. & D. 81.)

As in the case of adultery, so with the other defences, their sufficiency depends upon the circumstances under which they arise.

If the conduct of the petitioner is wilful and without extenuation, the Court usually declines to grant him any relief.

Effect of Delay.

Illustrations.—A husband discovered his wife's adultery fourteen years before he took proceedings for a divorce. In the interim he had accumulated ample means to defray the cost of the proceedings. He sought to explain the delay as attributable to his want of means.

Explanation rejected, and suit dismissed. (*Short* v. *S. et al.*, 3 P. & D. 193.)

A husband, whose pecuniary circumstances were embarrassed, postponed proceeding until he could bring forward conclusive evidence of his wife's guilt. Delay held reasonable. (*Wilson* v. *W.*, 2 P. & D. 441.)

A desire to avoid a public exposure of the scandal at a mother's wish, and a forbearance from proceedings

for twenty years, though a long delay, have not been considered sufficient grounds for barring a decree. (*Newman* v. *N.*, 2 P. & D. 58.)

An impression that by the elopement of his wife to America, and her residence there, a divorce would be unnecessary, and mental prostration due to his wife's misconduct, have been held a sufficient explanation of the petitioner's delay. (*Heaviside's Divorce*, 12 Cl. & F. 334.)

Cruelty.

Cruelty, isolated and trifling.—The cruelty of the husband may be isolated, and of such a character as not to raise an inference of future risk to the wife, in which case the Court will not take judicial notice of it.

Illustration.—A petitioner committed a violent act which caused his wife pain and injury. It was not accompanied by threats nor intentional. The Court treated it as not raising an inference of future risk, and therefore immaterial. (*Neild* v. *N.*, 4 Hagg. Con. p. 263.)

Cruelty the result of Misconduct.—Again, it may be produced by the respondent's misconduct.

Illustration.—A respondent wife, addicted to drinking, had, when under the influence of drink, been violent. Her husband, in restraining her, was also violent. (*Pearman* v. *P.*, 29 L. J., Mat. 54.)

A husband's cruelty preceded and conduced to his wife's estrangement and subsequent adultery. He sued thereupon for a divorce. The Court refused him a decree. (*Lempriere* v. *L.*, 1 P. & D. 569.)

Desertion.

For desertion, see *ante*, p. 14.

Wilful Neglect conducing to Adultery.

Illustration.—Taking a wife to a dancing-hall with another man, allowing her to dance with him constantly, and then leaving her there in his care, night after night, is wilful neglect conducing to adultery. (*Barnes* v. *B.*, 37 L. J., Mat. 4.)

Conduct conducing to Adultery.

Conviction and imprisonment of a party to a marriage does not justify desertion by the other. If such a desertion conduced to adultery no remedy could be obtained upon it.

Illustration.—A wife was convicted and imprisoned for theft. She did not on release return to her husband, but to domestic service. She next applied to him to take her back. He refused. She remained in service. The husband's conduct was not held to have conduced to her subsequent adultery. (*Williamson* v. *W. and Bates*, 46 L. T., N. S. 920.)

Numerous similar cases varying in detail only, but not in principle, are to be found in the reports.

Nullity of Marriage.—Suits for nullity are to have marriages declared void.

Marriages are—

1. Void *ab initio.*
2. Voidable at the option of the injured party.

Marriages void ab initio.

Marriages entered into by parties—

(i) To a previous marriage,
(ii) One of whom is insane,
(iii) Who are related within the prohibited degrees of relationship,

are void *ab initio.*

A previous Marriage.—A prior existing marriage renders the second marriage null and void on the

ground of bigamy. (*Miles* v. *Chilton*, 1 Rob. 698; 6 N. C. 636.)

Insanity.—An insane person has no power to consent. The contract of marriage requires consent: hence a marriage, one of the parties to which was insane when it took place, is null and void. (*Browning* v. *Reane*, 2 Phillim. 69; *Durham* v. *D.*, The Times, early in 1885. Here the insanity of the respondent was not established.)

Consanguinity or Affinity.—Marriages entered into between persons who are related to one another within the degrees of consanguinity or affinity stated in the Book of Common Prayer are null and void. (28 Hen. 8, c. 7, s. 11; *R.* v. *St. Giles*, 11 Q. B. 173; *Sherwood* v. *Ray*, 1 Moo. P. C. 385; *R.* v. *Brighton*, 1 B. & S. 447; 5 & 6 Will. 4, c. 54; *Ellerton* v. *Gastrell*, 1 Corn. 318; Gilbert's Eq. 156; Bunbury, 145.) By Lord Lyndhurst's Act of 1835, these marriages, which had been till then voidable, were made void *ab initio.*

Public Policy.—The interests of society are protected by laws which regulate the status of its members and of their issue. Marriages in violation of these laws are held void. They are opposed to the interests of society, which are synonymous with public policy.

Illustration.—English persons within the prohibited degrees of relationship married abroad where the ceremony was permissible. The marriage was declared void in England, the country of the domicile of the parties. (*Brook* v. *B.*, 3 Sm. & G. 481.)

Had the marriage not been declared void *ab initio*, the status of the parties, and of their issue, if any, would have been illegally changed. The parties would be regarded as man and wife, and their issue as legitimate, which in neither case would have been so.

Void marriages may be declared so at any time for the reasons above given. (*Browning* v. *Reane*, 2 Phillim. 69; *Pride* v. *Bath*, 1 Salk. 120; *Haydon* v. *Gould*, *ib.* 119.)

Voidable Marriages.—Marriages are voidable on the ground (1) of impotence; (2) of want of age.

Impotence.—A marriage is voidable, at the suit of the injured party only, on the ground of impotence, or the physical incapacity of the other party for sexual intercourse. (*North* v. *Seaton*, 3 Phillim. 147; *Scott* v. *Jones*, 2 N. C. 38.)

Evidence.—To establish impotence it is necessary to prove (1) that the marriage has not been consummated; (2) that the respondent is unable to consummate it. (*Scott* v. *Jones*, 2 N. C. 38.)

Triennial cohabitation is usually requisite in the absence of an apparent physical infirmity.

Independent evidence of impotence may be indispensable.

Voidable Marriages, when to be set aside.—Voidable marriages must be set aside, if at all, during the lifetime of the parties. If the party injured does not complain no one else can do so, being unable to prove the injury, which is necessary to maintain the suit. (*A.* v. *B.*, 1 P. & D. 559.)

Want of Age.—A minor may sue for nullity of marriage (*Sherwood* v. *Ray*, 1 Moo. P. C. 397; *Green* v. *Dalton*, 1 Ad. 290), or may rescind the contract on attaining majority; and the consent of parents or guardians, through the medium of notice by banns or other statutory notice, is requisite also before marriage. (4 Geo. 4, c. 76, s. 16; *R.* v. *Birmingham*, 8 B. & C. 29.)

The parents or guardians of minors may sue on their

behalf on establishing a pecuniary interest in them. (*Bevan* v. *McMahon*, 2 S. & T. 60.)

Defences.—The defences to a suit for nullity consist of —a denial of the grounds of the petition; delay in suing; suppression of relevant facts; absence of sincerity or *bona fides* in suing. (*H.* v. *C.*, 1 S. & T. 605; *Briggs* v. *Morgan*, 2 Hagg. C. C. 330; *E.* v. *T.*, 3 S. & T. 312; *Guest* v. *G.*, 2 Hagg. C. C. 321.)

Pleas which may be proved on failure of Petition.—Pleas of adultery, cruelty, and desertion are open to the respondent if the petition fails; otherwise they would not be admissible, because proof of nullity of marriage would at once render such charges wholly inappropriate.

Judicial Separation.

Either husband or wife may sue for a judicial separation on the ground of adultery, cruelty, or desertion.

In the case of the wife's adultery, the husband usually sues for dissolution.

Each of these offences has been already dealt with. See *ante*, pp. 11, 13, 14.

Desertion without reasonable excuse.—Desertion without reasonable excuse, for two years and upwards, is ground for judicial separation to husband or wife. (*Cargill* v. *C.*, 27 L. J., Mat. 70; *Basing* v. *B.*, 33 L. J., Mat. 150.)

The defences to this suit are—

(1) Denial of the offences charged;

(2) Proof of a matrimonial offence against the petitioner, as adultery, cruelty, connivance, collusion, condonation, desertion; Also,

(3) A decree already made upon the same issue;

(4) A deed in which the petitioner has covenanted not to sue in the Divorce Court.

(*Marshall* v. *M.*, 5 P. D. 23.)

Restitution of Conjugal Rights.

A suit for restitution of conjugal rights may be instituted by either of the parties to the marriage, when deprived by the other of cohabitation without a legal ground.

What is a legal ground will appear presently, when defences to a suit for restitution of conjugal rights are reached.

Until a recent Act was passed (M. C. A. 1884), the offending party was compelled, in the absence of such ground, to comply with the decree of the Court, and render restitution of conjugal rights to the other, on pain of imprisonment. Now, however (see sect. 5), on disobedience to the decree, he becomes liable to a suit for judicial separation, on the ground of desertion. The disobedience is treated as evidence of intention to desert, and thereupon a suit for desertion may be instituted forthwith. If the wife be the petitioning party, she may claim a divorce, where her husband has also committed adultery, on the grounds of adultery and desertion.

Maintenance on Decree.—On a decree of restitution in favour of the wife, the Court may order that, on failure to comply with the decree within the time limited by the Court, the respondent shall pay to the petitioner, periodically, fixed sums, such payments to be enforceable like orders for alimony in suits for judicial separation. The Court may, if it think fit, order the husband, to its satisfaction, to secure to the wife such periodical payment, and, for that purpose, may refer it to one of the conveyancing counsel of the Court to settle and approve of a deed to be executed by all necessary parties. (M. C. A. 1884.)

Object of the Court.—The object of the Court in permitting suits for restitution *was* to control the respondent in his marital capacity, and to compel him to render back to his wife her conjugal rights, if he had wrongfully deprived her of them. (*Firebrace* v. *F.*, 4 P. D. 68; *Yeatman* v. *Y.*, 1 P. & D. 489.)

Object of the Petitioner.—The object of the petitioner in a suit for restitution *has been* almost invariably hitherto to enforce a money demand, on pain of a decree for restitution in the event of a refusal.

Now, however, under the new Act (see sect. 2), disobedience is not followed by attachment.

The legislature, finding by experience that it is well for man and wife at times to live apart, where incompatibility of temper or other obstacles to happy married life exist, no longer enforces cohabitation at the will of one of the parties, but substitutes the remedy of separation on the ground of desertion, taking care that the process of the Court shall no longer be used to extort unjust pecuniary terms.

Defences.—The ordinary defences to a suit for restitution are adultery and cruelty.

Illustration.—A wife leaves her husband. He sues for restitution. She may plead adultery or cruelty; either, if proved, will disentitle him to relief. (*Burroughs* v. *B.*, 2 S. & T. 574, 1859.)

Each of the grounds for nullity of marriage is also a defence, because, if proved, it would upset the marriage, and, that being done, a claim for restitution of conjugal rights, or rights of marriage, would obviously be no longer tenable.

Insanity after marriage is no answer. (*Hayward* v. *H.*, 1 S. & T. 83.)

Where insanity supervenes after marriage the proper

remedy, should cohabitation become unsafe, is restraint and not desertion. (*Radford* v. *R.*, 28 L. T., N. S. 279.)

Separation, in pursuance of an agreement, would be an answer. (*Woodey* v. *W.*, 31 L. T., N. S. 647.)

A covenant in a deed not to institute matrimonial proceedings, subsequent to the execution of the deed, in respect of anything that occurred before it, may also be pleaded as an answer. (*Marshall* v. *M.*, 5 P. D.)

Failing proof of the above charges, the Court will make a decree of restitution, which the respondent can obey or not under the new Act.

If she obeys it, the litigation ceases. If she does not, he can then institute proceedings for desertion, alleging her disobedience to the decree of the Court as his ground for so doing.

Jurisdiction.—A wife cannot sue for restitution except in the country of her husband's domicile. (*Yelverton* v. *Y.*, 1 S. & T. 574.)

This is the law now, but it is doubtful if it would receive judicial sanction where a case of hardship to an innocent wife would result. (See *Niboyet* v. *N.*, 4 P. D.)

Jactitation of Marriage.—This is a suit to counteract the boasting of the respondent that he is married to the petitioner, whereby a common reputation of their marriage may ensue.

The party wronged is the only one who may sue. (*Campbell* v. *Corley*, 31 L. J., Mat. 60.)

Defences.—

1. A denial of the boasting.
2. Setting up the actual marriage.
3. A plea that the boasting, though false, was not malicious. (Milward's Irish Reports.)

CHAPTER III.

ALIMONY.

WHERE husband and wife are in litigation in the Divorce Court, and the one has means and the other none, the Court can order the party having means to contribute a certain definite sum for the support of the other party during and sometimes after the litigation. The provision so made is called alimony pending suit, and permanent alimony.

The order for alimony pending suit is made irrespective of the merits of the suit.

As they are not yet in question they are irrelevant. (*Bird* v. *Bell*, 1 Lee, 209.)

The Amount.—There is no fixed rule as to the amount (*Rees* v. *R.*, 3 Phillim. 389), but it is usually a fifth of the husband's income. (*Hayward* v. *H.*, 28 L. J., Mat. 9.)

Custody and Access.

In suits for judicial separation, nullity, or dissolution, the Court has power over the custody, access, maintenance, and education of the children of the marriage, both pending, on, and after, the final decree. (M. C. A. 1857, s. 35, and M. C. A. 1859, s. 4.)

Orders pending suit are called *interim* orders, and the latter final orders.

Principles guiding the Court.—The Court acts upon the existing facts of the case—*e. g.*, the age of the children, their position in relation to the other members of

the family, and the fact that there is a suit pending between their parents in which there are conflicting charges the truth of which is not yet decided. Hence the allegations and affidavits *in the case* are not usually of importance. (*Ryder* v. *R.*, 2 S. & T. 227; 30 L. J., Mat. 44; 9 W. R. 440; 3 L. T., N. S. 678.)

The Interest of the Children.—Where the interest of the children will suffer, all other considerations give way. (*D'Alton* v. *D'A.*, 47 L. J., Mat. 59.)

This is true, both pending suit and on decree. (*Ibid.*; and see *Boynton* v. *B.*, 30 L. J., Mat. 156.)

Father innocent.—An innocent father retains the custody of his children, and the innocent wife is made to suffer as little as possible, under the circumstances. (*D'Alton* v. *D'A.*, *ante.*)

Mother innocent.—It seems needless to state that where the wife is innocent, and the husband has broken up his home, he will not only not have custody of the children, but, if he can, he will have to find means for their maintenance. (*Milford* v. *M.*, 1 P. & D. 715; 38 L. J., Mat. 63; 21 L. T., N. S. 155; 17 W. R. 1063.)

Neither innocent.—When neither husband nor wife are fit to have the custody of their children, it is entrusted by the Court to third parties, who may be either interveners in the suit or nominees of the Court. (*Chetwynd* v. *C.*, 1 P. & D. 41; 35 L. J., Mat. 21.)

Third Parties may intervene.—When a third party shows that he is entitled to intervene upon the question of custody or access, he is permitted to do so. (*Chetwynd* v. *C.*, 34 L. J., Mat. 131.

Orders are Temporary.—An order is but temporary, and may be varied on sufficient grounds. (*March* v. *M.*, 1 P. & D. 439.)

Power of the Court.—The power of the Court continues till the children are sixteen years of age. (*Mallinson* v. *M.*, 35 L. J., Mat. 84; 1 P. & D. 221; 14 W. R. 978; 14 L. T., N. S. 636.)

Maintenance.—Maintenance follows custody (*Webster* v. *W.*, 31 L. J., Mat. 184), *i. e.*, an order for the maintenance of the children is made upon the unsuccessful applicant for custody, if he or she can find the means.

Power of Court in Suits for Restitution, and on Dismissal of Suit.—The Court has no power over the children in suits for restitution (*Chambers* v. *C.*, 39 L. J., Mat. 56; 22 L. T., N. S. 727; 18 W. R. 528); nor where the petition is dismissed. (*Seddon* v. *S.*, 31 L. J., Mat. 101.)

Co-respondents.—A husband, charging his wife with adultery, must charge the adulterer also, or, if he is unable to serve him with the petition and citation, he must obtain leave to dispense with him. (M. C. A. 1857, s. 28, and r. 4.)

Damages.

Where a husband sues his wife for adultery, he may claim damages from the co-respondent.

The Amount.—The jury settles the amount.

The Principle of the Assessment.—The measure of damages is the value of the wife of whom the petitioner has been deprived. (*Cowing* v. *C.*, 33 L. J., Mat. 149; *Forster* v. *F.*; see note to *Cowing* v. *C.*)

The Application of them—The Court settles to what they are to be applied. (M. C. A. 1857, s. 33.)

Particular Application.—The application of the damages depends upon the priority of interests of the parties and their children. (See *Billingay* v. *B.*, 35

L. J., Mat. 84; *Clark* v. *C.*, 31 L. J., Mat. 61; *Latham* v. *L.*, 30 L. J., Mat. 43.)

Settlements.

Where the Court pronounces a decree *on the ground of the wife's adultery*, and she is shown to be entitled to any property, the Court *may* order it to be settled for the benefit of the innocent husband and children. (M. C. A. 1857, s. 45.)

The existence of the disability of the wife's coverture at the time of the execution of any instrument under the order of the Court, in pursuance of the above enactment, shall have no effect. (M. C. A. 1860, 23 & 24 Vict. c. 144, s. 5.)

After final decree in suits for *nullity and dissolution*, the Court may vary the settlements for the benefit of either child or parent (M. C. A. 1859, s. 5; *Marsh* v. *M.*, 36 L. J., Mat. 65; *Sykes* v. *S.*, 2 P. & D. 163); or for the benefit of the innocent party alone. (M. C. A. 1878, s. 3.)

Protection Orders.

By 41 Vict. c. 79, s. 4, orders are obtainable by wives on conviction of their husbands for assault under stat. 24 & 25 Vict. c. 100, s. 43, of protection, and separation, similar to a decree of judicial separation on the ground of cruelty.

An appeal lies from such an order to the Divorce Division.

A wife deserted by her husband may apply to the Court for an order protecting her property acquired since the desertion. (*Sewell* v. *S.*, 28 L. J., Mat. 8.)

Suits for the Declaration of Legitimacy.

Natural-born subjects of the Queen, or persons whose right to be deemed so depends wholly or in part

on their legitimacy, or the validity of a marriage, being domiciled in England or Ireland, or claiming real or personal estate in England, may apply to the Court for a declaration of legitimacy, on a month's notice to the Attorney-General under 21 & 22 Vict. c. 93, ss. 1 and 8. (See r. 174; *Upton* v. *Att.-Gen.*, 32 L. J., Mat. 177; 6 Jur., N. S. 404.)

Acts on Petition.—See rules 56 to 61, inclusive. The proceedings are therein fully explained. For a case, see also *Dysart* v. *D.*, 2 N. C. 16. These cases are not of frequent occurrence.

CHAPTER IV.

PRACTICE.

The Petition.

All matrimonial proceedings are commenced by petition. The petition should state, concisely and clearly, and in separate paragraphs, the marriage, &c., and the charges upon which the petitioner relies.

Cross Suits.—When cross suits are instituted by husband and wife, each against the other, they are usually consolidated, as the trial of one generally decides the issues in both. (*Osborne* v. *O.*, 33 L. J., Mat. 38.)

Opinion of Judges.—Divorce may be decreed on behalf of or against a lunatic through a guardian *ad litem.* Kelly, C. B., Denman, J., Pollock, B.; *contra*, Brett, J., Keating, J.

Divorce is not a crime. Hence divorce proceedings are not criminal proceedings. Hence the rule that criminal proceedings against a lunatic shall be stayed till sanity returns does not apply. (See *Mordaunt* v. *Moncrieffe*, L. R., 2 Sc. & Div. Appeals, 374.)

Minors over seven years may appear by guardian as petitioners, respondents, or interveners (R. 105), not necessarily co-respondents. (R. 108.)

Formâ pauperis.—Parties who desire to sue *in formâ pauperis* must apply for leave, on counsel's opinion that there is reasonable ground for the suit (R. 25; see also M. C. A. 1857, s. 54), on the pauper's soli-

citor's affidavit that the case on which the opinion was given is complete and truthful, and on the pauper's affidavit that he is not worth 25*l.* and his wearing apparel. (R. 26.)

Where the husband sues *in formâ pauperis* the wife may apply to defend as a pauper, on affidavit that her separate property does not exceed 25*l.* after payment of her debts (R. 210); and, when she is petitioner, the husband may, on a similar affidavit, defend as a pauper. (R. 211.)

Withdrawal of Petition.—The petition, once filed, cannot be withdrawn without motion for withdrawal or consent of the respondent. (*Lutwyche* v. *L.*, 28 L. J., Mat. 56.)

Re-service of Petition.—Re-service of the petition on amendment is unnecessary where the respondent would not be prejudiced. (*Ambler* v. *A.*, 32 L. J., Mat. 6.)

The verifying Affidavit.—The allegations in the petition must be supported by the petitioner's affidavit, verifying on oath such of them as are within his own knowledge, and stating his belief that the others are true. (R. 2.)

Denial of Collusion and Connivance.—In all original petitions, except those for restitution of conjugal rights, the verifying affidavit must contain a denial of collusion or connivance between the parties. (See r. 3; M. C. A. 1857, s. 41.)

When collusion is pleaded, the usual verifying affidavit must contain the words in reference to collusion, "otherwise than is hereinbefore set forth."

Preliminary Demand of Restitution.—The affidavit verifying a petition for restitution of conjugal rights

must satisfy the registry that the petitioner has demanded cohabitation and restitution, and that they have been withheld. (R. 175.)

The verifying affidavit is necessary, under sect. 41 of the Divorce Act of 1857, as security on oath by the petitioner that the proceedings are *bonâ fide*. (*Deane* v. *D.*, 1 S. & T. 90.)

The Citation.—After filing the petition and the verifying affidavit, the petitioner must extract a citation, and serve it on the respondent parties under the seal of the Court. (R. 9.)

The Præcipe.—The party extracting the citation takes it with a *præcipe* for deposit in the registry. The *præcipe* contains his London address, and particulars of the citation. It is then a guide in the registry for the issue of additional citations, if necessary. (See *Kirk* v. *Dolby*, 6 M. & W. 639, on *præcipes* generally.)

Service.—Service of the citation must be personal, if possible, by delivery of a copy, and production of the original, if required. (RR. 10, 11: and see M. C. A. 1857, s. 42.)

The practice is on service of the citation to serve also a copy of the petition. (R. 12.)

Substituted Service.—Substituted service is only allowed on application to the Court, and when personal service is impossible. (R. 13.)

Substituted service is by means of advertisement under the direction of the registry. (*Elsley* v. *E.*, 32 L. J., Mat. 145.)

Every effort must have been made to effect personal service. (*Ludlow* v. *L.*, 28 L. J., Mat. 5.)

Return of Citation.—After service the citation must

be indorsed with certificate of service, returned into the registry, and there filed.

The return is necessary to prove that the proper steps have been taken. (*Cook* v. *C.*, 28 L. J., Mat. 37.)

Affidavit of Service.—The affidavit of service should have the citation, with the date of service indorsed upon the back, appended as an exhibit. (R. 18.)

Citation mislaid.—Where a citation is mislaid after service there must be an affidavit of service (*Perret* v. *P.*, 35 L. T., N. S. 910), specifying in what capacity the party is served (*Temple* v. *T.*, 31 L. J., Mat. 34), and annexed to it the duplicate of the citation to which it refers, and this must be marked by the commissioner before whom the affidavit is sworn. (R. 18.)

Appearance and Non-Appearance.—The next stage in the proceedings is that of appearance, or the necessary procedure by the petitioner on non-appearance of the respondent parties.

Appearance.—Appearance must be entered in the appearance book in the registry. (R. 19.) And an address given by the party appearing within three miles of the General Post Office. (R. 21.)

Time for Appearance.—The usual time for appearance is eight days, but circumstances render a definite fixture in all cases impossible. (See *Child* v. *C.*, 33 L. J., Mat. 156.)

Appearance late in the Suit.—Leave to appear may be applied for at any time after a proceeding has been taken in default, (under r. 20), by summons in the registry, (r. 185), founded on an affidavit of the facts, which must be satisfactory to the officiating registrar.

Appearance under Protest.—A person objecting to the jurisdiction of the Court may appear under protest, and in eight days file an act on petition in extension of such protest, and deliver a copy to the petitioner. (R. 22.)

Non-Appearance.—On non-appearance the affidavit of service and the citation are filed in the registry before the petitioner can proceed. (R. 17.)

Amendments.—On good grounds a petition or answer may be amended at any time before the decision of the Court. (*Bunyard* v. *B.*, 32 L. J., Mat. 176; 11 W. R. 990.)

The principle on which amendments are allowed, like appearances after time, is that justice may be done. (*Rowley* v. *R.*, 29 L. J., Mat. 15.)

Proceedings by Default.—Proceedings by default take place on non-appearance by the respondent parties within the time given. (See THE CITATION.) The petitioner can take them, on affidavit filed in the registry, of service of citation, and of search for and non-appearance, or appearance and no answer, within the specified time.

The Answer.—The next step, in the event of regular procedure, is the answer. (See DEFENCES TO MATRIMONIAL SUITS.)

The time for it is usually within twenty-one days. (*Conradi* v. *C. et al.*, 36 L. J., Mat. 68.)

When the answer contains distinct allegations, in addition to denials, there must be an affidavit filed verifying the former. (R. 30.)

Appearance and no Answer.—Appearance and no answer does not give a party a *locus standi* at the trial, except as to costs.

Particulars.—The object of particulars is to enable the party charged to meet the charge by evidence to the contrary, and to preclude surprise. Applications for particulars are made by summons in the registry. (RR. 38 and 181.)

Demurrers.—Either party may demur to the allegations of the other.

Demurrers here, as elsewhere, admit the facts, but deny that they constitute the offence charged, or are an answer to the allegation made.

A party cannot plead and demur to the same charge in the petition without the leave of the Court. (*Leete* v. *L.*, 31 L. J., Mat. 121.)

The generality of a charge is not ground for demurrer or amendment, but only for particulars. (*Ibid.*)

Further Pleadings.

The Reply.—Fourteen days are allowed in which to deliver a reply, and the same time for subsequent pleadings. (R. 32.)

Joinder of Issue.—Joinder of issue is not allowed. A denial raises the issue in divorce proceedings.

Mode of Trial.—Motions for directions for mode of trial are now abolished, and trial is as follows:—

1. Where damages are not claimed trial is by oral evidence, before the Court itself, without a jury.

2. Where damages are claimed, trial is before a common jury, subject to an application by summons for a different mode of trial. (R. 205.)

Questions for the Jury.—Questions for the jury are drawn up by the petitioner, and settled by the registrar. (R. 41.) They depend upon the pleadings.

Hearing and Trial.—Hearing, strictly used, signifies the hearing of the cause before the Court itself without a jury. Trial signifies the trial of the cause before a jury. (See r. 205 (1) and (2), July, 1880.)

Hearing Demurrers.—Demurrers are set down for hearing as causes are, and, on application, the Court will fix a time for argument. (R. 67.)

When the demurrer goes to the root of the whole case, it is usually heard first. (*Griffith* v. *G.*, 33 L. J., Mat. 81.)

In Camerâ.—The Court may hear a suit for nullity or judicial separation *in camerâ*, but not a suit for dissolution. (M. C. A. 1857, s. 22; and *C.* v. *C.*, 1 P. & D. 640; 38 L. J., Mat. 37.) But where the disclosures are likely to be prejudicial to public morality, it is customary, on consent, to take suits for dissolution *in camerâ*.

Evidence.—Evidence in divorce is oral or *vivâ voce*, and written, as by affidavits, exhibits, letters, diaries, and such like. (*Robinson* v. *R. et al.*, 1 S. & T. 366.)

Oral Evidence.—Witnesses are generally examined in open Court. (M. C. A. 1875, s. 46.)

Evidence by Affidavit.—Mere introductory matter, as the marriage, cohabitation, terms of the separation or parting, &c., may be proved by affidavit, but not the substantial case for the petition by affidavit alone. (*Adams* v. *A.*, 22 W. R. 192: 29 L. T., N. S. 699.)

Commissions.—When persons are too ill to attend (*Stone* v. *S.*, 31 L. J., Mat. 136), or abroad and unable to attend, or about to go abroad (*Pirie* v. *Iron*, 1 Dowl. 253), before the hearing (M. C. A. 1857, s. 47; and see rr. 129, 130, and 181 to 184), commissions issue on

application in the registry for their evidence to be taken on commission.

The other side have due notice to enable their representative to attend, and cross-examine if necessary. (R. 131.)

Evidence taken on commission is subject to the same objections as evidence ordinarily tendered at the trial. (*Brown* v. *B.*, 33 L. J., Mat. 203; *Stone* v. *S.*, 31 L. J., Mat. 136.)

Its admissibility will be decided when it is tendered. (*Hill* v. *H.*, 30 L. J., Mat. 197.)

There must be satisfactory evidence of the witness's inability to attend at the trial before the deposition will be admitted. (See rr. 132 to 137, inclusive.)

Evidence of Parties.—The parties, and their husbands and wives, may now give evidence in suits on the ground of adultery. (32 & 33 Vict. c. 68, s. 3.)

But a witness need not undergo cross-examination respecting his or her adultery, unless he has already denied it in the examination-in-chief. Parties now frequently appear and deny the adultery, and have to undergo a rigorous cross-examination.

Proof of Marriage.

The marriage is usually proved by a certified copy of the register, or by a witness of the ceremony (*Q.* v. *Mainwaring*, 26 L. J., M. C. 11); or it may be presumed from the evidence given relating to it, as by repute, &c. (*Sichel* v. *Lambert*, 12 W. R. 312.)

Identity.

Handwriting.—Handwriting alone is seldom sufficient to prove identity.

Photographs.—Photographs will not be received by the Court when better evidence can be obtained.

The question of identity, though apparently a simple one, is a standing block in a large number of cases. The petitioner's evidence, of his wife's identity, and of her adultery, will not be acted upon by the Court unless it is corroborated. (*Harris* v. *H.*, 2 P. & D. 77.)

The Decree.—In suits for dissolution the decree of dissolution is called a decree *nisi*, and does not operate until it is made absolute.

New Trial and Hearing.

A new trial and hearing, which were provided for by sect. 55 of the Matrimonial Causes Act of 1857, must now be applied for in accordance with the following amended rule.

Rule 62, *July*, 1885.—An application for a new trial of the issues of fact tried by a jury, or for a rehearing of a cause, shall *hereafter* be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and shall be by notice of motion filed in the registry stating the grounds of the application, and whether all or part only of the verdict, or findings, or decree is complained of; and such notice of motion shall be filed and served upon the other parties in the cause, or their solicitors, within eight days after the trial or hearing; and the motion shall be made eight days after the service of the notice of motion if a Divisional Court shall be then sitting, or otherwise on the first day appointed for a sitting of the Divisional Court after the expiration of the eight days, and the time of the vacations shall not be reckoned in the computation of time for serving such notice of motion.

Rule 62*a*.—The notice of motion may be amended at any time by leave of the Court, or a judge, on such terms as the Court or a judge may think fit.

Grounds for a New Trial.—A new trial is only granted on the ground of error, or miscarriage on the part of the jury. (*Scott* v. *S.*, 3 S. & T. 320: 33 L. J., Mat. 1.)

Appeal.—Either party dissatisfied with the decision of the judge, on the application for a new trial or re-hearing, may, within fourteen days, appeal to the Court of Appeal. (23 & 24 Vict. c. 144, s. 2.)

Appeals now go to the Court of Appeal.—Now all appeals which might have been brought to the full Court under M. C. A. 1857, or any other Act, must be brought to the Court of Appeal. (J. A. 1881, c. 68, s. 9.)

Further Appeals.—The decision of the Court of Appeal on any question under the Divorce Acts, relating to divorce or legitimacy petitions, is final, except in suits for dissolution, or nullity, or declarations of legitimacy, or on questions of law on which the Court of Appeal can give leave to appeal; and, save as above, no appeal lies to the House of Lords under these Acts. (*Ibid.*, sub-s. 2.)

Time of further Appeal.—Subject to any order of the House of Lords, under the Appellate Jurisdiction Act, 1876 (c. 69), every appeal to the House of Lords in a suit for dissolution, nullity, or for a declaration of legitimacy, must be within a month of the decision of the Court of Appeal, if the House of Lords is then sitting, or within fourteen days after it next sits. (*Ibid.*, Part 3; *Cleaver* v. *C.*, L. R., 9 Appeal Cases, 631.)

Course when no Appeal.—When there is no appeal from the decree *nisi*, or an unsuccessful one, the suit usually comes to an end in six months after the decree on pronounciation of the decree absolute. (See J. A. 1881, c. 68, s. 10.)

The Decree absolute.—The final step, in the absence, or on failure of intervention (see *ante*, p. 19), is now reached, namely, the decree absolute.

The Court will only dissolve a marriage on the application of the innocent party. (*Ousey* v. *O. and Atkinson*, 1 P. D. 56.)

On pronounciation of the decree absolute the suit is concluded, and the parties to it may marry as soon afterwards as they please. (M. C. A. 1868, s. 4.)

Decrees absolute are pronounced in Court upon motion days after the motions are over. Certain affidavits must first be filed. (See rr. 80, 194, &c.)

The affidavits are of search without success for appearance of any person wishing to intervene, or show cause against the decree, or, if there has been an appearance, of the proceedings thereon. (See rr. 80, 194, and 207.)

Alimony.—The proceedings in relation to alimony are carried on in the registry by petition and answer, and the respondent can be called upon to attend for cross-examination concerning his means.

The party without means is entitled to petition for alimony on filing a petition, or on being served with one, and appearing in the suit. (R. 82.) In the absence of special circumstances an order follows as a matter of course. (*Miles* v. *Chilton*, 1 Rob. 700.)

The verifying affidavit must also have been filed. (R. 81.)

Compliance with the order to pay alimony or costs is enforceable by debtor's summons in the County Court. See The Debtors' Act.

Attachments.—Decrees and orders in matrimonial proceedings are enforceable like judgments, orders, and decrees in Chancery (20 & 21 Vict. c. 85 (M. C. A. 1857), s. 52), except the above.

For proceedings in relation to custody and access, see *infra*, MOTIONS AND SUMMONSES.

Motions and Summonses.

The rules direct the proper method of dealing with certain matters in divorce proceedings, and, except where the rules and practice direct a different mode of procedure, all matters can be dealt with by summons. (R. 160.)

Motions.—Motions in divorce are applications to the judge in Court upon matters incidental to the various matrimonial suits, and in accordance with certain rules of procedure.

The following applications must be by motion:—

Applications to dispense with a co-respondent. (RR. 4 and 5.)
Applications for substituted service. (R. 13.)
Applications for leave to intervene. (R. 23.)
Applications for new trial or rehearing. (R. 62.)
Showing cause against a decree. (R. 76.)
Applications to confirm the registrar's report in relation to marriage settlements. (R. 102.)
Applications for custody of children. (R. 104.)
Applications for attachments. (R. 110.)

Applications for discharge from prison under an attachment. (R. 112.)

Applications for the discharge of a wife's protection order. (R. 125.)

Summonses are applications to the judge or a registrar in chambers.

Motions and summonses must be supported by affidavits of the facts intended to be used at the application, and of which the other side must have due notice, and also copies of the affidavits.

Summonses—Appeals.—An appeal from a judge on summons lies to the same judge in Court, and thence to the Court of Appeal.

Costs.—The husband is usually liable for the wife's costs, for he has theoretically all the property on marriage. The exception arises where the reason fails, *i. e.*, where the wife has separate property of her own.

The co-respondent's costs are entirely in the discretion of the Court. (*Whitmore* v. *W.*, 1 P. & D. 25.)

He is not condemned in costs unless he is proved to have known the respondent was a married woman when he committed adultery with her.

Maintenance and Settlements.

Rule 214, 1885.—All applications to the Court to exercise the authority given by sects. 2, 3, and 6 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), are to be made in a petition, which may be filed as soon as by the said statute such applications can be made, or at any time thereafter.

Rule 215, 1885.—Rules 97 to 102, both inclusive, of

the Rules and Regulations for this Court bearing date 26th December, 1865, and Rule 195 of the Additional Rules bearing date 14th July, 1875, and Rule 204 of the Additional Rules bearing date 17th April, 1877, shall, so far as the same are applicable, be observed in respect to applications by petition to exercise the authority given by sects. 2, 3, and 6 of the Matrimonial Causes Act, 1884.

PROBATE LAW.

CHAPTER I.

ORIGIN OF THE PROBATE DIVISION.

THE Probate Division is one of the Divisions of the High Court of Justice. Its full designation is "the Probate, Divorce, and Admiralty Division." The Probate Court, created by the Court of Probate Act of 1857, exercised all probate jurisdiction till the constitution of the High Court of Justice in 1873.

Probate Jurisdiction before 1857.—Prior to 1857 probate jurisdiction had been exercised almost from time immemorial by the Ecclesiastical Courts.

Business of the Probate Division.

The Probate Division exercises "the *voluntary and contentious* jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons," and determines "*all questions relating to matters and causes testamentary*, except those relating to legacies, and the distribution of residues. (Court of Probate Act, 1857, ss. 4, 23; J. A. 1873, s. 16.)

County Court Probate Jurisdiction.—The County Courts also are empowered to try probate actions where the estate of the deceased is less than 200*l.* personalty, and 300*l.* realty. (Court of Probate Act, 1858, s. 10.)

Nature of Probate Business.—All probate business is

in relation to wills and intestacies, and it may be classed under two heads :—

1. Voluntary, or common form.
2. Contentious.

Voluntary Probate Business.

1. Voluntary or non-contentious business "shall include all common form business as defined by the Court of Probate Act, 1857, and the warning of caveats." It signifies "obtaining probate and administration, where there is no contention as to the right thereto, including the passing of probates and administrations through the Court in contentious cases where the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration." (Personal applications in registries.)

Rules in Non-Contentious Business.—This class of business is, in nearly all cases, provided for by printed rules guiding the probate registries in which it is transacted throughout the kingdom, and to be bought at a trifling cost.

The Probate Registries.

The *principal* Probate Registry is at Somerset House. Various *district* probate registries in England and Wales are enumerated in Schedule A. to the Court of Probate Act, 1857.

Cases of Doubt.—Where cases of doubt or difficulty arise, in uncontested matters, the question in doubt must be submitted for the consideration of the principal registry, or the judge on motion. (See Rules, District Registry, 9, 20, 50, 98.)

CHAPTER II.

WHO MAY MAKE A WILL.

All persons may make wills, except—

1. Those who lack testamentary discretion.
2. Those who lack free will.

Persons lacking Testamentary Discretion.

No will made by any person *under the age of twenty-one years* shall be valid. (1 Vict. c. 26, s. 7.)

Idiots, The Deaf Dumb and Blind, and Lunatics—are all incapable. The two former classes are wanting in the senses by which the reasoning faculty is brought into action (Coke, Litt. 42b); in other words, they lack "the common inlets of understanding."

Lunatics.—The last named lack the *animus testandi*, and include those who are drunk when they make their wills.

The animus testandi.—The *animus testandi*, or desire to make a will, must emanate from a sound mind.

A sound Mind.—A sound and disposing mind means a mind of natural capacity, not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence. (*Smith* v. *Tibbitts*, 36 L. J., Prob. 97.)

Lucid Intervals.—Wills made in lucid intervals, by persons of habitually unsound minds, are valid. (*Mud-*

way v. *Croft*, 2 N. C. 442; *Prinsep* v. *Sombre*, 10 Moo. P. C. 232.)

"Acts done during a lucid interval are to be considered as done by a person perfectly capable of contracting, managing, and disposing of his affairs at that period. A multitude of questions have been raised upon the execution of a will during a lucid interval, and, that being proved, the will has been held valid and effectual to all intents and purposes." (*Hall* v. *Warren*, 9 Ves. 610; *Cartwright* v. *C.*, 1 Phillim. 99.)

Illustration.—A testator, subject to violent attacks of excitement and passing delusions, made a will, consistent with the dictates of affection, during lucid intervals. During a fit of excitement he tore up the codicil. The lucid intervals having been established, the will and codicil were admitted to probate. (*Borlase* v. *B.*, 4 N. C. 109.)

Insanity, onus of Proof.—Every man is presumed to be sane until he is shown to have become insane. (*Groom* v. *Thomas*, 2 Hagg. 434; *Cartwright* v. *C.*, 1 Phillim. 100; *Brooks* v. *Barrett*, 24 Mass. 98.) Then the onus is upon those who set up his will to prove that it was made in a lucid interval.

Lack of free Will.

The Married Women's Property Act of 1882 (45 & 46 Vict. c. 75), s. 1, renders a wife capable of "disposing by will of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee." In so doing it repealed sect. 8 of 1 Vict. c. 26, which rendered a married woman unable to make a valid will, except such a will as might have been made by her before the passing of the Wills Act.

Undue Influence destroys free Will.—Where a testator's will is proved to have been made under undue influence, it is bad. It is not the will of the testator, but of those who influenced him.

Undue Influence explained.—Although a person has the requisite testamentary capacity, if *dominion or influence* be obtained over him, preventing the exercise of it in making his will, his capacity is destroyed, and the will is not entitled to probate. (*Mountain* v. *Bennett*, 1 Cox, Eq. C. 354.)

The influence to vitiate an act must amount to force and coercion destroying free agency. It must not be the influence of affection or attachment: it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted: that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. Undue influence, or importunity, is something in the nature of force or fear destroying free agency. (*William* v. *Goude*, Hagg. E. R. 581.)

Felons.—Under the Act of 1870, for the abolition of forfeiture on conviction for felony, the felon's property vests in the Crown, and, on the completion of his sentence, or pardon, or death, it reverts to him or his legal personal representative. His will operates only on his death. His sentence expires with him, but his will remains, and it would seem that this establishes a felon's right to make a will.

Execution.

Observation.—As nearly fifty years have elapsed since the Wills Act of 1837 was passed, an inquiry into the law relating to wills before that Act seems unnecessary here.

Execution since 1837.—The word "execution" implies, not merely execution by the testator, but, in addition, attestation also. The statutory enactment relating to execution and attestation is as follows:—

"No will shall be valid, unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some person in his presence, and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." (Wills Act, 1837, s. 9.)

This section needs to be taken to pieces and examined somewhat critically.

The Form.—First of all, "No *will* shall be valid, unless," &c.

The fact that the paper sought to be established is not in the ordinary form of a will does not invalidate it. Whatever the form, the paper, if testamentary in effect and duly executed, will operate as a will, though it be a deed poll, or indenture, or other document. (*Habergham* v. *Vincent*, 2 Ves. jun. 220; *Masterman* v. *Maberley*, 2 Hagg. 247.) A letter (*Repington* v. *Holland*, 2 Lee, 106), a "plan of a will" (*Mathews* v. *Warner*, 4 Ves. jun. 186), "heads of a will" (*Milligan*, 2 Roberts. 108), a testamentary passage from a letter (*Parker*, 28 L. J.,

Prob. 91), a writing "to take effect as soon as possible after death" (*Mundy*, 2 S. & T. 119; 30 L. J., Prob. 85), have all been admitted to probate.

Writing.—The instrument must be in writing. The writing may be in ink, or pencil, or both, so long as it is testamentary, and duly executed. (*Rymes* v. *Clarkson*, 1 Phillim. 35.) For obvious reasons ink, if available, is preferable to pencil for the purpose of writing a will.

The Language or Tongue.—Again, the language, whether Greek, or Hebrew, or Sanscrit, it matters not; though, for equally obvious reasons, a will which is to be proved in England should be made in a language offering but little difficulty in its interpretation.

Joint Wills are bad.—There can be no joint wills. (*Hobson* v. *Blackburn*, 1 Add. 277.) Where there are parties to a will it may be admitted to probate as the will of both after the death of the survivor. (*Stracey*, Dea. & Swa. 7; *Lovegrove*, 2 S. & T. 453.)

The Signature.—The section goes on to say, "that the will shall be signed by the testator, *or by some other person in his presence and by his direction.*" The testator need not write his name; his mark will suffice (*Baker* v. *Denning*, 8 A. & E. 97), and his hand may be guided. (*Wilson* v. *Beddard*, 12 Sim. 28). If he does write he may write a name which is not his own, if preferred. (*Glover*, N. C. 553; *Clark*, 1 S. & T. 22; *Redding*, 2 Roberts. 339.)

Acknowledgment.

1. A testator need not write a signature to his will (*ante*, p. 53), but he *must* acknowledge it, if written

for him, and it must be made in his presence and by his direction. (*Regan*, 1 Curt. E. 908.)

2. It is necessary, also, for it to be made or acknowledged by him in the presence of two or more witnesses present at the same time. (See the Act 1 Vict. c. 26, s. 9.)

The Position of the Signature.—The section (9th) states, as it seems, that the will "shall be signed at the foot or end thereof."

This passage did not receive sufficient attention for some time at the hands of testators, and frequently wills, in all other respects perfectly valid, came before the Court, but with the signatures in a position which by no possibility could be passed as having been signed at the foot or end. Consequently an Act was passed to explain literally the meaning of the expression "at the foot or end." (15 Vict. c. 24, s. 1.)

Effect of each Wills Acts.—The *earlier* Act, 1 Vict. c. 26, s. 9, is imperative in directing that the signature shall be at the foot or end.

The *later* one, 15 Vict. c. 24, s. 1, permits it to be placed either *anywhere after the will upon the paper or papers containing it*, or *among the words of the attestation clause;* but the section enacts that *no direction underneath the signature or inserted after it is affixed shall be carried out.*

"*At the Foot or End*" *explained.*—The object of the expression at the foot or end in the *earlier* section has been pointed out to be "to prevent a space being left between the foot or end of the will, and the signature of the testator, so as to admit of additions being made after execution." (*Carneby* v. *Gibbons*, 1 Rob. 705; 6 N. C. 679.) Hence the later and explanatory section.

A Will need not be continuous.—The provisions of the Act 1 Vict. do not require a will to be written continuously. (*Corder*, 1 Rob. 671; see also under 15 Vict. *Hunt* v. *H.*, 1 P. & D. 209; 35 L. J., Prob. 135.)

There may be Blanks in a Will.—"There are no words in the Act 1 Vict. to hinder a space or spaces being left blank in the body of the will." (*Carneby* v. *Gibbons*, 1 Rob. 705; 6 N. C. 679; see also under 15 Vict. *Hunt* v. *H.*, 1 P. & D. 209; 35 L. J., Prob. 135.)

Attestation.—The witnesses to the testator's signature or acknowledgment shall attest and subscribe the will in his presence. That is, they shall signify that they do actually witness the testator's part of the transaction, and as evidence of their so doing they shall each of them sign the will in his presence.

The Attestation Clause.

No Form of Attestation shall be necessary.—The practice of most people is to include an attestation clause in the document, as an evidence, doubtless, of the due execution of the will; but, though usual, and perhaps convenient and explicit, it is not actually necessary, as shown above.

The Absence of the Attestation Clause.—The entire absence of an attestation clause would only necessitate extrinsic evidence, clear and satisfactory, of due execution and attestation. (*Roberts* v. *Phillips*, 4 E. & B. 453.)

Seamen's Wills.—There are certain important amplifications and modifications of the 9th section of the Wills Act (1 Vict. c. 26, s. 9), in relation to seamen's

wills, which it may be useful to know. These are set out in the Navy and Marine Wills Act, 28 & 29 Vict. c. 72, ss. 3, 4, 5, 6 and 7, and the sub-sections to 5 and 6.

Witnesses to Wills—Executors.—"No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof." (Wills Act, 1 Vict. c. 26, s. 17; see also *Griffiths* v. *G.*, 2 P. & D. 303.)

Legatees.—Under sect. 15 of this Act gifts to an attesting witness, or a wife, or husband of such witness, are void. (*Clark*, 2 Curt. 330.) That is to say, the execution of the will is not invalidated by the oversight of making an attesting witness a legatee, but the legacy is of no effect. (Sect. 14.)

Three attesting Witnesses.—But if of three attesting witnesses one is a legatee, and the other two are not he may retain his legacy; but, in so doing, he ceases to be an attesting witness. The will in such a case is not affected. (*Anderson* v. *A.*, 13 Eq. 385; see Wills Act, 1 Vict. s. 14.)

Creditors.—Creditors, or their wives, or husbands, may be witnesses to a will. (1 Vict. c. 26, s. 16.)

Their Interest.—Their interest goes no further than to have the deceased's will proved, and their *claim* paid.

Revocation.—A will is revocable during the testator's lifetime, because his *last* wishes, either committed to writing or expressed by silence, constitute his will. Anything prior to those *last* wishes may be recalled to give them effect.

Revocation and Alteration.—The presumption upon the irregular appearance of a will is manifestly twofold of revocation or of alteration.

Modes of Revocation.—The various modes of revocation will now be inquired into. They are all dealt with in sects. 18, 19 and 20 of the Act.

Sect. 18 (*Marriage*).—Every will made by a man or woman *shall be revoked* by his or her marriage (except a will under a power of appointment). This is an alteration of circumstances expressly provided for.

Sect. 19 (*Presumption of Revocation*).—But sect. 19 enacts "that no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances." That is to say, no other alteration of circumstances will suffice.

Sect. 20 (*Modes of Revocation enumerated*).—No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (*i.e.*, by marriage, *ante*, s. 18), or *by another will or codicil duly executed*, or *by some writing* declaring an intention to revoke the same and *duly executed as a will*, or *by burning*, or *by tearing*, or *otherwise destroying* the same *by the testator or by some person in his presence, and by his direction, with the intention of revoking the same.*

The act must be done, it should be carefully observed, by the testator, or by some person in his presence, and by his direction. Further than that, it must be done *with an intention of revoking the same.* This last passage about the intention is vital to the inquiry. If the act be not done with what is called the *animus revocandi*, the will remains valid, and, though destroyed, will, if reproduced, by recollection or draft (*Trevelyan* v. *T.*, 1

Phillim. 149; *Sugden* v. *Lord St. Leonards*, 1 P. D. 154), be admitted to probate. A case has already been cited in which a will made in a lucid interval, and destroyed during a fit of insanity, has been admitted. (*Borlase* v. *B.*, 4 N. C. 106.)

Alterations.—Alterations to have any effect, whether in the body or at the end of the will, must themselves be duly executed like the will itself. They are then valid. (*Treely*, 3 P. & D. 242; *Blewitt*, 5 P. D. 116.)

Any alteration, after the testator's death, is bad, even though it be the result of a conversation with him. (*North*, 6 Jur. 564.)

Cancellation.—Cancellation is not a term recognized in the Wills Act of 1837, though of general use prior to that time. Cancellation is an equivocal act, and does not now signify revocation. In order to take effect the cancellation must be made *animo revocandi* (*Thynne* v. *Stanhope*, 1 Add. 53), and unless it be done with the same formalities as those employed on the execution of a will, it has no effect. (*Rose*, 4 N. C. 101).

Interlineations and Alterations, when valid after 1837.—Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.

Proof of their Existence before Execution of Will requisite.—When interlineations or alterations appear in the will (unless duly executed, or recited in, or otherwise identified by, the attestation clause), an affidavit or

affidavits in proof of their having existed in the will before its execution must be filed, except when the alterations are merely verbal, or when they are of but small importance and are evidenced by the initials of the attesting witnesses.

Erasures and Obliterations.—Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate.

In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.

Appearance of the Paper—Marks inferential must be explained.—If there are any vestiges of sealing-wax or wafers or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum, or other document must be required; and, if not produced, its non-production must be accounted for.

Incorporation.—When two testamentary papers by the same hand are in existence, it must be settled, prior to probate, whether the later incorporates or revokes

the earlier. A will may be good by reference to some other paper, no matter what. If that paper is ascertained, it is as much a part of the will as if it was within the sheets, even though it is not executed. (See *Habergham* v. *Vincent*, 2 Ves. jun. 208; *Edwards*, 6 N. C. 306.)

Incorporation or Revocation.—A later testamentary paper does not work a total revocation of a prior one, unless the later expressly, or in effect, revokes the former, or unless the two are incapable of standing together. (*Lemage* v. *Goodban*, 1 P. & D. 57.)

Dependent Relative Revocation.—Where there is evidence of an intention to revoke a will by a later one, if that intention has not been carried into effect the former will remain precisely as it was. In other words, dependent relative revocation is revocation by substitution dependent on the validity of the substituted instrument. (*Winsor* v. *Pratt*, 2 Brod. & Bing. 655.)

Revocation by a subsequent inconsistent Will.—Subsequent wills, if consistent, give rise to the doctrine of incorporation, which has been already dealt with. If inconsistent, then, of course, revocation ensues, but a later will only revokes the former when inconsistent with it wholly or in part, according to the degree of inconsistency. (*Lemage* v. *Goodban*, 1 P. & D. 57.)

Revocation under a Power.—Questions arise whether a testamentary paper is an execution or revocation of a power at all; and, if an execution of the power, whether it is valid as such. If it is doubtful whether the last will is a valid execution of a power by deed, and there are other previous testamentary papers relating to the power, the Probate Court admits them all to be con-

strued by the Court of Chancery. That Court then proceeds to ascertain, not if the power is duly executed in the various papers before it, but which of the papers does execute it. The execution of a power cannot take place in two or more testamentary papers by the same person, executed or unexecuted, and incorporated, but it must be confined to one only. (*Fenwick*, 1 P. & D. 319.)

Express Revocation in Writing.—The Wills Act distinguishes between revocation *by will or codicil*, and by *some writing.* (Sect. 20.) A letter, testamentary in purport, duly executed as a will, and declaring an intention to revoke the writer's will, has been admitted to probate, as "some writing declaring an intention to revoke" under the Wills Act, and as being of a testamentary character. (*Durance*, 2 P. & D. 406.)

Revocation by Codicil.—Revocation of a codicil does not revoke the will also, unless the intention to do so be manifest or proved, and the codicil be itself duly executed. (*Black* v. *Jobling*, 1 P. & D. 690; *Turner*, 2 *ibid.* 403.)

Revival by Codicil.—A codicil which refers in adequate terms to a revoked will revives it; but the intention to do so must be clear. (1 Vict. c. 26, s. 22.) A *future* intention is not sufficient. (*Thomas* v. *Evans*, 2 East, 488.)

Revocation by Implication.—Marriage, as already pointed out, is an express revocation of a testator's will, by the Act, but no other alteration in circumstances suffices. Hence there can be no revocation by implication, as might at times have taken place prior to the Wills Act.

Revocation conditional upon Revival.—Where, of two inconsistent wills, the earlier one is destroyed, a codicil to it purporting to revive it (*Rogers* v. *Goodenough*, 2 S. & T. 342; 31 L. J., Prob. 49) will not do so, for "it is gone—destroyed *animo revocandi*—the codicil cannot in effect revive that will." (*Hale* v. *Tokelove*, 2 Roberts. 318.) But where a codicil fails to revive an earlier destroyed will, if the intention to revoke the intermediate one be dependent upon the revival of the earlier one, revocation will not ensue. (*Newton* v. *N.*, 5 L. T., N. S. 218.)

Wills Contingent.—A will purporting to be contingent upon the happening of a certain event, in other words, to be of no effect if that event does not happen, for example, contingent upon the testator's death during a period of service on the Gold Coast, is revoked by his survival. If the contingency does not take place revocation ensues without further action. (*Parsons* v. *Lanoe*, 1 Ves. sen. 190.)

Wills Duplicate.—Wills are at times made in duplicate, that is, a testator may have two similar wills engrossed from the same draft. One he may keep, the other he may lodge with a friend, or at his bank, for safety. Each of these wills is a duplicate of the other. If the testator revokes the duplicate will in his possession, or alters it in conformity with the Wills Act, the alteration will affect the copy not in his possession. (*Onions* v. *Tyrer*, 1 P. Williams, 343.)

Wills Nuncupative.—Wills nuncupative, or by word of mouth, are at times admitted to probate, but under circumstances of a most pressing description, *i. e.*, in military and naval service (see Wills Act, 1837, s. 11),

which leaves unaltered the provisions of 29 Car. 2, c. 3, in relation to nuncupative wills. Under sect. 19 there must be three witnesses present when such a will is made, and the testator must call their attention to the fact that it is his will. Other and more minute details in reference to wills of this description will be found in the statute above mentioned.

A recent Informal Will.—An instance of an informal but valid will, though not nuncupative, is that of the late Lord St. Vincent, 16th Lancers, who, just prior to his death, at Abu Klea in the Soudan, made a codicil to his will on January 16th, 1885, in pencil, and in the form of a letter to his mother Lady St. Vincent.

CHAPTER III.

EXECUTORS.

Executors.—The next portion of the inquiry relates to executors, the persons selected by the testator to prove his will and administer his estate.

Who may be Executors.—All persons capable of making wills may also be executors, including married women and infants. (See the last Married Women's Property Act; *Darke*, 1 S. & T. 576.)

Infant Executors.—Infant executors cannot act or take probate till they reach the age of twenty-one years, but a guardian may act for them. (38 Geo. 3, c. 87, s. 6.)

Felons as Executors.—Where an executor becomes a felon his duties devolve upon his representative under the Crown until his sentence expires. (See the Treasury Act, 33 & 34 Vict. c. 23, s. 9.)

Two Kinds of Executors.—Executors are of two kinds:—

1. *Executors*, or those stated to be so in the will.
2. *Executors according to the tenor*, or those found on reading it to have been deputed to discharge the duties of an executor.

1. *A Lunatic Executor.*—When an executor becomes a *lunatic* the Court appoints an administrator, and usually selects the lunatic's committee. (*Evans* v. *Tyler*, 2 Robert. 132; 3 N. C. 296.)

2. If without specifically appointing A. B. his executor, the testator directs him to do certain things which constitute the duties of an executor, as, for instance, *to discharge all lawful demands against his will and codicils* (*Grant* v. *Leslie*, 3 Phillim. 119), *to pay debts and general expenses, and expenses of proving a will* (*Fry*, 1 Hagg. 80); in short, if he be directed to get in the estate, to pay the debts due from the estate, and to discharge the legacies (*Fraser*, 2 P. & D. 186), he is executor according to the tenor, no matter how these duties are expressed.

Limited Executorships.—Executorships of both kinds may be limited to certain duties, as to administer a testator's property in a particular place. (*Adamson*, 3 P. & D. 253.)

Legatees.—Executors have certain specified duties to perform, but where the testator leaves property without directing any duties to be performed, the person to whom he leaves it becomes a legatee. (*Oliphant*, 1 S. & T. 525.)

Conditional Executorships.—An executor may be appointed conditionally, *e. g.*, upon his proving the will within three months after the testator's death. (*Day*, 7 N. C. 553.)

Effect of the Appointment.—Where in two or more consistent wills different executors are appointed all may take probate. (*Morgan*, 1 P. & D. 323.) Though two wills are inconsistent *in part*, but the appointment of executors is not so, the second will does not *revoke* the appointment in the first. The mere appointment of executors entitles a paper to probate. (*Leese*, 31 L. J., Prob. 169; 2 S. & T. 442.)

The Chain of Representation.—"The power of an executor is founded upon the special confidence and actual appointment of the deceased, and such executor is, therefore, allowed to transmit that power to another in whom he has equal confidence (2 Blackstone, Com. 506); and the executor of a sole executor, or of a sole surviving executor, represents the original testator's estate, provided his own testator has proved the will. And by this connection (what is called) the chain of representation may be carried on indefinitely." (Wentworth on Executors, p. 461, 14th ed.)

The surviving Executor only can transmit the Chain of Representation.—Where there are two executors, and one makes a will naming executors and dies, and the other dies after him intestate, the executor of the first deceased executor shall not be executor to the first testator. The executorship is settled in the other and surviving executor. (Wentworth on Executors, 14th ed., p. 215; *Smith*, 3 Curt. 31.)

An Executor cannot assign his Office.—His power is only such as specified in the will. (*Adamson*, 3 P. & D. 253.) The testator has confidence in him, but not, unless so stated, in any nominee he may select.

Executor failing to Prove the Will.—If the executor does not prove the will, the chain of representation is not commenced—with one exception, that of an executor's agent under letters of attorney, who by means of them represents the executor.

Distinction between Probate and Administration—An Executor only can Prove.—No one can *prove* a will but the executor, and after him his executor, to whom by first proving he transmits, as seen, the chain of repre-

sentation. By the expression to *prove* is signified to obtain probate.

Administration with the Will annexed.—If the executor does not prove, then the executorship is determined, and the duties which were to have been performed by the executor devolve upon someone who in law is termed an administrator, *i. e.*, a person who administers the testator's estate according to the provisions of his will. This form of administration is called *administration with the will annexed*, to distinguish it from *administration under intestacy*, which will be dealt with later on.

Renunciation.—An executor who does not, voluntarily, prove the will, may be called upon, or *cited* (see CITATIONS), to do so (C. P. A. 1857, s. 23) by someone who wishes to have the estate administered under the will. The executor must then accept or refuse probate, and his decision, once made, is final. (*Ibid.* s. 79.) His failure to appear to the citation is treated as a tacit renunciation of his rights, and they thereupon cease. The Court then appoints an administrator, selected by it according to the circumstances of the case. (C. P. A. 1858, s. 16.)

Retractation.—An executor may renounce and still be at liberty to retract his renunciation, provided the grant of administration with the will annexed has not yet passed the seal of the Court. (*Hayward* v. *Dale*, 2 Lee, 333; *McDonnell* v. *Prendergast*, 3 Hagg. 212.)

The Executor's Rights.—The executor's rights on the death of the testator are complete, with one exception: he cannot bring an action as executor without producing the probate as evidence of his title to sue. (*Wills* v. *Rich*, 2 Atk. 285.)

Intermeddling.—An executor who commences to manage, or perhaps mismanage, the estate, and does not continue to act, is said to intermeddle, and he can be compelled to take probate. (*Panchard* v. *Weger*, 1 Phillim. 212.)

Acts of Necessity.—But acts of necessity do not bind him, and even if he has shown himself willing to accept he may be dismissed by the Court in aid of justice. (*Ibid.*, and see *Long* v. *Symes*, 3 Hagg. 774.)

Acts of Executors constituting Liability to take Probate.—Whatever an executor does showing an intention to take on himself the executorship amounts to an administration; and whatever acts will make a man liable as an executor *de son tort* will be deemed in the executor "an election of the executorship." (Bacon's Abr. Executors [E.] 13.)

Penalties for acting without Probate.—An executor administering a testator's estate, and omitting to obtain probate for six months, is liable to a penalty of 100*l.* and ten per cent. on the duty payable upon it. (55 Geo. 3, c. 184, s. 37, repealed in part by 32 & 33 Vict. c. 14, s. 12; 33 & 34 Vict. c. 99; 35 & 36 Vict. c. 93, s. 4; Stat. Law Revision Acts, 1873 and 1874.)

Executors de son tort.—There are also other persons who, though not named executors, become in law executors *de son tort* if they intermeddle with the deceased's estate in any way from which it might be presumed that they were his executors. (See *Edwards* v. *Harben*, 2 T. R. 597.) With them, however, the Probate Division has nothing to do.

ADMINISTRATION.

Administration.—The next matter to be inquired into is that of administration. Administration is of two kinds:—

1. Administration with the will annexed.
2. Administration under an intestacy.

1. *Administration with the Will annexed.*—A grant of administration, in this form, is made to a person nominated by the Court to administer an estate, according to the terms of the will, when the will appoints no executor, or where the executor fails or declines to act, and either a legatee, or, him failing, a creditor, or other person, applies for the grant.

2. *Administration under an Intestacy.*—Administration under intestacy, stated broadly, is a grant to some person entitled to a portion of the deceased's estate in distribution and in order of priority of right; *i. e.* to the immediate or more remote next of kin, or, him failing, to a creditor, or, lastly, to a nominee of the Court.

Administrator's Rights, when ceasing.—The rights of an administrator, unlike those of an executor, necessarily cease upon his death.

Forms of Grants—The various descriptions of grants of administration usually made apply to testacies and intestacies alike. The forms they take are not so various as the objects in view when they are sought and made. The procedure in relation to each and all of them is almost similar, with the exception of the distinct forms of documents requisite, and the steps they point out. The applicant may be assisted by the table below. The more usual forms are as follows:—

Durante minore ætate (*Hagger*, 3 Sw. & Tr. 65);
(as by a guardian, limited to majority, but general or limited as regards the estate.)

Durante absentiâ (*Pallison* v. *Ord*, Bunb. Exch. 166);
(by an agent for the use and benefit of and limited to the return of his principal, otherwise general or limited.)

De bonis non (*Southmead*, 3 Curt. 29);
(general or limited, of an estate administered in part.)

Cæterorum (*Boxley* v. *Stubington*, 2 Lee, 542, testacy);
(to administer that portion of an estate to which no grant has hitherto applied.)

Ad colligenda bona (*Clarkington*, 2 Sw. & Tr. 382);
(as to collect in and administer a perishable estate.)

Ad litem (*Chanter*, 1 Rob. 274);
(as to substantiate proceedings in chancery, and limited thereto.)

Pendente lite (*Sutton* v. *Smith*, 1 Lee, 209);
(limited to the conclusion of legal proceedings.)

Cessate (*Abbott* v. *A.*, 2 Phillim. 578);
(as to revive the grant to a surviving executor on the decease of his co-executor who has acted.)

"For the use and benefit of the lunatic" (*Southmead*, 3 Curt. 29);
(to his committee, and limited to his recovery, otherwise general or limited.)

Different Forms which may arise.—Administration under either head may be general,—*i. e.*, for the complete management of the estate; it may be to continue it, for a limited purpose, as for the execution of certain duties under a will. Stated shortly, it may be either general, limited or special as to the estate, period or purpose to which the grant relates.

Administration with the Will annexed.—An executor not acting, the duty of seeing that the testator's wishes are carried out devolves upon the Court.

Power of the Court.—The Court has in special cases unlimited power in the matter of appointing an administrator, but it is most careful to protect the interests of all parties in doing so. (C. P. A. 1857, s. 73.)

The Principle of the Grant.—Those most likely to discharge the office with care and diligence are selected.

The grant is usually made to those having the greatest interest under the will or right under an intestacy, and therefore the greatest object in a fair administration of the estate.

Who is first selected.—Under a will a residuary legatee is generally selected, because he, having only the residue after all claims upon the estate are satisfied, is certain to administer it with care, that his own share may be as much as possible. (*Repington* v. *Holland*, 2 Lee, 254.) Other legatees at times obtain the grant, but usually all having greater interest must first be cited.

Priority of Claim.—Under a will interest is the ruling indication of priority of claim, and in administration under an intestacy right is the guide, and it is determined by priority of relationship.

The Husband's Rights.—A husband has the first right to administer his wife's estate, provided he survives her; and in the absence of proof of survival, the grant goes to her next of kin. (*Selwyn*, 3 Hagg. 784; *Taylor* v. *Diplock*, 2 Phillim. 267.)

The Widow.—A widow usually administers her husband's estate unless there are prevailing objections. (*Stretch* v. *Pynn*, 1 Lee, 30.)

Commorientes.—Where the deaths of husband and wife have taken place at about the same time, viz. where there is no evidence that one survived the other, the next of kin of each is entitled to administer their estates separately. (*Wheeler*, 31 L. J., Prob. 40.)

Onus of proving Survival.—The *onus* of proving survival lies upon the representatives of the deceased for whom it is claimed, and failing that the other deceased's

next of kin takes the grant to his estate. (*Salterthwaite* v. *Powell*, 1 Curt. 705.)

Next of Kin.—Husband or wife failing, the grantee is usually one of the next of kin according to priority.

Bankruptcy of Applicant.—The bankruptcy of the applicant is a material question for the consideration of the Court. (*Bell* v. *Timmiswood*, 2 Phillim. 22.)

Priori petenti.—Where there are two applicants of equal right, the grant usually goes to the one who applies first. (*Cordeux* v. *Trasler*, 34 L. J., Prob. 127.)

Limited Grants.—If the estate is not fully administered by the executor or administrator with a will, or by the administrator under an intestacy, the next grant is called a grant *de bonis non administratis.* A grant may be limited also to a special purpose in relation to the deceased's estate.

Table of Succession under Intestacy.—The following shows the order in which the intestate's relatives rank as regards priority of claim to administer his estate.

1. Husband or wife;
2. Child or children;
3. Grandchild or grandchildren;
4. Great grandchildren;
5. Father;
6. Mother;
7. Brothers and sisters;
8. Grandfathers or grandmothers;
9. Nephews and nieces, uncles, aunts, great grandfathers or great grandmothers;
10. Great nephews, great nieces, &c., of whom all in an equal degree are equally entitled.

Sub-division of an Intestate's Estate.—Where an intestate's child predeceases his mother, without widow or children, each surviving child of the intestate shares the deceased child's share equally with the mother *per stirpes*. (1 Jac. II. c. 17, s. 7.)

Distribution does not take place for a Year.—Distribution of an intestate's estate does not take place for a year for the security of the estate. (Statute of Distributions, s. 3.)

The President's Rights over Intestates' Estates.—After the decease of any person intestate, and until administration is granted, the estate vests in the President of the Probate Division. (C. P. A. 1858, s. 19.)

Joint Administration.—Joint administration is only granted on consent. In the absence of consent it reverts to the residuary legatee, or other applicant in order of priority of interest or of right under an intestacy. (*Dampier* v. *Colson*, 2 Phillim. 54.)

Administration to Creditors.—Grants to creditors may be under a will or under an intestacy. But it is only when there is no executor, legatee, or next of kin entitled or willing to take a grant, that a creditor is able to do so. In no case can he oppose an applicant under a will. (*Menzies* v. *Pullbrook*, 2 Curt. 845.)

The Creditor's Object.—A creditor's only interest in the deceased's estate is to get his debt paid, and if no one else comes forward to administer the estate, he is entitled to do so with that object.

Affidavit of Amount.—A creditor applying for a grant must file an affidavit of the amount of the estate, where those primarily entitled have not been personally served. (*Martineau* v. *Rede*, 2 Add. 455.)

Affidavit of Date.—The date also when the debt was incurred must be sworn to. (*Rawlinson* v. *Burnett*, 3 S. & T. 479.)

The Statute of Limitations.—The Statute of Limitations bars an ordinary simple contract debt after six years, but it does not extinguish it. An executor or administrator may retain a debt due to himself six years old. (*Stahlschmidt* v. *Lett*, 1 Sma. & Giff. 415.)

Creditors, when ejected.—A creditor is only ejected from his office as grantee on *proof* of a better title (*Elme* v. *Da Costa*, 1 Phillim. 175), and is usually allowed his costs. (*Cole* v. *Rea*, 2 Phillim. 29.)

CHAPTER IV.

TESTATORS AND INTESTATES DOMICILED ABROAD.

Testators and Intestates domiciled Abroad.—It is the practice of the Probate Division to make the existence of personalty in this country a condition precedent to a grant of probate or administration, be the estate that of any person. If the deceased has no property in this country the Court has no jurisdiction.

Example.—*Tucker*, the wife, died intestate in France, leaving no personalty in England. Her domicile was English. Her husband survived her, and needed a grant of administration in this country in order to make good his claim in France by French law. As the deceased left no personalty in this country the grant was refused. (*Tucker*, 3 S. & T. 586.)

Observations.—Foreign Courts can adopt or ignore the proceedings of English Courts in relation to property in the jurisdiction of those foreign Courts at will; and it would be worse than useless for the Probate Division to make grants which it could not enforce. Hence it does not do so.

A Foreigner's Will, when valid.—The will of a foreigner (*i. e.*, of a foreign subject) disposing of property in England, wherever executed, must be proved to have been executed in accordance with the testamentary laws of the country of which he is a subject to entitle it to probate here.

Wills of British Subjects domiciled Abroad.—Every will made out of the kingdom by a British subject, whatever may be his domicile when making it or at his death, shall be good if made according to the forms required either by the law of the place where it was made, or by the law of the place where the person was domiciled when it was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

Example.—A German subject made a will in English form and codicils to it in German, executing all three documents in Germany. The will was bad in German law, and was, therefore, rejected here. The codicils fell with it. (*Von Buseck*, 6 P. D. 211; 51 L. J., Prob. 9; 52 L. J., Prob. 42.)

Administration of Foreigners' Assets here.—Personal property in this country, belonging to a foreigner or a British subject domiciled abroad, can only be obtained in the event of his death through the medium of a representative in this country. If he has died intestate, administration will be granted here, limited to the personal estate in this country. If he has left a will, valid, &c., probate of that will must be obtained here. (*Enohin* v. *Wylie*, 10 H. L. 19.)

Succession.—Where a person deceased abroad leaves personal property here, in every case the succession to it will be regulated, not according to the law of this country, but according to the law of the domicile. (*E.* v. *W.*, 10 H. L. 19.)

Affidavit of Property and Domicile.—Where a grant of probate or administration of the estate of a deceased resident abroad is applied for, it must be shown by affidavit that there is property in this country. (*Evans*

v. *Burrell*, 28 L. J., Prob. 82.) His domicile also must be shown by affidavit. (See Probate Rules.)

The Probate Court follows a Foreign Grant.—Where a will has been proved in a foreign Court, a duly authenticated copy will be admitted to probate in this country without further evidence of the validity of the will, as it is presumed that the foreign Court has been satisfied upon that point. (*Miller* v. *James*, 3 P. & D. 4.)

Scotch and Irish Probates.—A testator's property, it has been seen, follows the law of the country of his domicile, so that when any confirmation (21 & 22 Vict. c. 56, s. 12) of an executor of a testator domiciled in Scotland, including personal estate there and in England, is produced in the Probate Division and a duly authentic and a certified copy filed, the Division recognizes and seals the confirmation, which is henceforward a full authority in England. A like provision applies to Ireland. (20 & 21 Vict. c. 79, s. 95, amended by 22 & 23 Vict. c. 31.)

Personalty free from Probate Duty.—Personal property of deceased persons is, in nearly all cases, subject to the duties applying to probates, administrations, and administrations under intestacies. The exceptions apply to small estates, and obviate the expense of stamp duties payable usually. The estates exempt from duty are in most cases limited to 50*l.* Government pay, under 31 & 32 Vict. c. 90, s. 1, up to 100*l.* is free.

Seamen's pay, under the Navy and Marine Wills Act, 28 & 29 Vict. c. 111, is also free up to 100*l.*

Savings' bank deposits generally, and those of illegitimate intestates, are free up to 100*l.* (26 & 27 Vict. c. 87); and certain intestate estates of small value under 100*l.* (36 & 37 Vict. c. 52).

A more complete list will be found on reference to the statute book, or to a list set out therefrom in the Author's larger work on Probate, 2nd Edition, p. 247 *et seq.*

Wills of Realty.—A testamentary paper relating only to realty, and not appointing an executor, is not entitled to probate. (*Booth*, 3 P. & D. 177.) Nor does the appointment of executors in a will of realty, under a power relating to the realty only, entitle the will to probate. As regards personalty, the testator dies intestate. (*Tomlinson*, 50 L. J., Prob. 74.) But the appointment of executors in a will which purports to dispose of realty only does entitle the paper to probate. (*Brownrigg* v. *Pike*, 51 L. J., Prob. 30.)

Probate in Solemn Form (Realty).—Probate in solemn form affects the realty under the will, since the Probate Act of 1857, ss. 61, 62, 63, 64, just as the Wills Act of 1837 affected the personalty under a will which purported to deal with it.

Unintentional Intestacies.—A will relating to a portion only of a deceased's property, real or personal, manifestly creates an intestacy as regards the remainder. The heir-at-law takes the realty, the next of kin the personalty, under the Statute of Distributions.

CHAPTER V.

PROBATE, ETC.

Distinction between Probate or Administration in Solemn Form and in Common Form.—*Probate in Solemn Form* is a decree of probate in open Court, pronounced by the presiding judge upon proof of the due execution of the will, and is binding upon all interested parties who have notice of the proceedings. (See *post*, CONTENTIOUS PROCEEDINGS.)

Probate in Common Form is proof of the will in the principal or a local registry (*i.e.* district probate registry), before the acting registrar, upon affidavits of the necessary particulars (see the Probate Rules in Non-Contentious Business, 1862), including the consent of all interested parties.

Probate in Common Form: General Directions—Personal Applications—Personal applicants must follow the directions given concerning them. These can be purchased of the Queen's Printer for a nominal sum, and also the Rules above-mentioned.

Necessary Evidence in Common Form.—It will be found on careful perusal of the Probate Rules that there must be evidence given that the deceased had a fixed abode in the district where the application is made, if it be to a district registrar. (R. 3, D. R.) This evidence is usually supplied on the executor or administrator's oath.

Notices of Application.—The student's attention is drawn to rr. 55—60 D. R.

Affidavit of Death.—The date of the testator's death must be given under r. 60. It is usually furnished in the applicant's affidavit.

Marking the Will.—This affidavit speaks of the will as marked. Therefore, before filing his affidavit the applicant must mark the will.

Papers ordinarily requisite.—A schedule of the deceased's property. (R. 13, Personal Applications.)

The executor's or administrator's oath. (See r. 57 D. R., 47 P. R.)

His affidavit of the deceased's personalty for the Inland Revenue Commissioners. (55 Geo. 3, c. 184, ss. 38, 39.)

The forms of the various oaths, affidavits, grants, and other official documents usually required, are those found included with the Rules.

Personalty in Scotland or Ireland.—When the deceased has left personalty as above, r. 74 P. R., 86 D. R., must be complied with.

Citing the Queen's Proctor—Bastards.—In certain cases it is necessary to cite the Queen's Proctor. (See rr. 88 and 89 D. R., 75 and 76 P. R.) Where a bastard dies intestate, without any known relations, and there is no appearance to the citation mentioned in the above rule, the grant goes to the Queen's Proctor's representative under the Act relating to Treasury grants. (39 & 40 Vict. c. 18.)

Nature of Grants.—Grants of probate or administra-

tion are—(1) original; (2) supplementary; or (3) accumulated.

1. Original grants are the first applied for in relation to the estate to be administered.
2. Supplementary grants are to carry on the administration of an estate already administered in part. These, already mentioned before (*ante*, p. 71), are called grants *de bonis non administratis*.
3. Accumulated grants are necessary to administer property in more than one of the various divisions of the United Kingdom under r. 74 P. R.

Original grants are sub-divided into—

(i.) General.
(ii.) Limited.
(iii.) Special.

(i.) General grants apply to all the deceased's personalty, and under a will they continue so long as the chain of representation remains unbroken.

(ii.) Limited grants are limited as to—

(a) time, as *durante absentiâ*, or till the finding of a will;
(b) property, as to administer a certain fund;
(c) purpose, as to represent the deceased in Chancery proceedings, or under Lord Campbell's Act.

Grants save and except.—These grants especially exclude from the grant the particular funds to which the words above are intended to apply, and precede *cæterorum* grants.

Cæterorum Grants.—These grants apply to the rest of the testator's estate, exclusive of that portion of it to which the limited grant *save and except* applies.

Example.—Grants *save and except* applies to all the

testator's personalty *save and except* a particular fund, and to that fund the grant *cæterorum* applies.

Supplementary Grants.—A *cessate* grant, as distinguished from a grant *de bonis non* (see *ante*, p. 71), is a permanent supplementary grant of the whole of the testator's estate, as contemplated in an original temporary grant limited as to time or a given contingency. When that time or contingency has arrived the purpose of the original grant is effected, and the supplementary grant to complete the administration is a *cessate* grant. The following rules relate particularly to special or limited grants:—D. R. 34, 35, 36, 43, 51, 52, 58.

Grants to Guardians.—The rules relating to these grants particularly are D. R. 39, 40, 41, 42. Other particulars in reference to grants generally, and not specifically alluded to here, can be ascertained from the rules which are issued for guidance upon points of detail.

The Administration Bond.—An important distinction between probate and administration exists: no security is required from the executor, but all administrators must, unless absolved by the Court, find security for a just and fair administration of the estate. This is done by their entering into a bond.

County Court Jurisdiction—Contentious Business.—Three incidents are requisite to give the County Court jurisdiction to try a suit relating to the estate of a deceased person:

1. That the deceased, whether a testator or an intestate, should have his fixed place of abode in one of the County Court districts. (21 & 22 Vict. c. 95, s. 10.)

2. That the personal estate should be under the value of 200*l.*;

3. And that the deceased at the time of his death should not be seised or beneficially entitled to any real estate of the value of 300*l.* or upwards. (*Thomas* v. *Nurse*, 39 L. J. Prob. 80; 21 & 22 Vict. c. 95, s. 10.)

Revocation of Grants in Common Form.—Revocation and alteration of grants are of two kinds, viz., in contentious and non-contentious or common form business. Revocation of grants in common form is by application on affidavit in the registry if of a sufficiently simple character. If the question relating to it is one of doubt or intricacy the case must be brought before the judge on motion.

Causes of Revocation.—A grant may have been made upon—

(i) Inaccurate representation;

(ii) Fraudulent representation; or

(iii) To apply to a condition of things which subsequent events so change as to render the grant inoperative.

(a) Where probate is granted of a will as the last will and a later will is discovered, or where a person's will is proved and he subsequently appears alive. (*Napier*, supposed to have been killed in battle, 1 Phillim. 83.)

(b) Where a deceased man's paramour obtains administration of his estate by falsely representing herself to be his widow. (*Moore*, 3 N. C. 601.)

(c) An executor after proving becomes a lunatic. This defeats the object of the grant, and necessitates another to his sane co-executor or to an administrator, as the case may be. Either of these causes above may

be added to indefinitely, but the principles governing them are similar.

Rules—Revocation and Alteration of Grants.—The following rules apply to the above:—

"Grants of probate or letters of administration can only be revoked by order of the judge or of one of the registrars of the principal registry." (62 P. R.)

"No grant of probate or letters of administration is to be altered by a district registrar without an order of a registrar of the principal registry having been previously obtained. In case the name of the testator or intestate requires alteration, the notice of application must be renewed, and the alteration ordered is not to be made by the district registrar until the usual certificate on such notice has been received from the principal registry." (63 P. R.)

Lost Grants.—Lost grants must be brought in to the registry whenever they are discovered. On an undertaking so to bring them in, fresh ones issue. (*Carr*, 1 S. & T. 111.)

Motions.—Motions in probate proceedings are of two classes—

1. Non-contentious;
2. Contentious.

1. *Non-contentious motions* are in relation to matters of doubt in reference to wills and administrations which must, under statute (C. P. A. 1857, s. 50), be decided by the Court. (See *Tomlinson*, 50 L. J. Prob. 74.)

Cases of Doubt.—The following rules will show under what circumstances it is necessary to apply to the Court on motion in non-contentious business:—

"If it be doubtful whether any will or codicil be entitled to probate, or whether any interlineation,

alteration, erasure, or obliteration ought to prevail, or whether any deed, paper, memorandum, or other document ought to form part of a will or codicil; or if any doubt arise in consequence of the appearance of the paper or on any other point, *the district registrar must communicate with the registrar of the principal registry.*" (20 D. R.)

"If, on perusing the affidavit or affidavits setting forth the facts of the case, it appear doubtful whether the will or codicil has been duly executed, *the registrar may require the parties to bring the matter before the judge on motion.*" (6 P. R., 9 D. R.)

"The district registrar is not, in any case in which a will apparently duly executed has been produced to him for probate or for administration with the will annexed, to grant probate of any former will, or administration with any former will annexed, or administration to the deceased, as having died intestate, *without an order of the judge or of one of the registrars of the principal registry*, showing that the last will is not entitled to probate. In the absence of such order, *the district registrar is to communicate with the registrars of the principal registry.*" (50 D. R.)

"When motions are to be made before the judge in Court, with regard to any application for probate or administration at a district registry, the district registrar is to transmit all original papers and documents to the principal registry, and the same, after the directions of the Court have been taken, will, on the application of the parties, be returned to the district registrar together with an office copy of the decree of the judge, unless the judge shall otherwise direct, and in order that the grant of probate or administration may be completed in a district registry." (77 P. R., 90 D. R.)

"Original papers are also to be forwarded to the principal registry whenever an inspection of them is necessary, in order to enable the registrars to answer the questions submitted to them by the district registrar." (91 D. R.)

"Original papers and documents may be transmitted by the district registrars to the registrars of the principal registry through the post office and back again. Such letters or packets are to be superscribed with the words, 'On Her Majesty's Service,' and may be registered, if thought necessary." (78 P. R., 92 D. R.)

"The district registrars are in every case of doubt or difficulty to communicate with the registrars of the principal registry." (98 D. R.)

Treasury Grants.—Treasury grants, or grants of administration of the estates of bastard intestates dying without next of kin, are made by statute to the Solicitor to the Treasury, representing the Queen, their *ultima heres*, on motion. (*Dyke* v. *Walford*, 5 Moo. P. C. 434; 6 N. C. 309.)

Similar grants are made on motion to the solicitors to the Duchies of Lancaster and Cornwall. (See 39 & 40 Vict. c. 18, s. 2.)

Rights of Felons.—A felon's rights vest in the Treasury Solicitor during his sentence. (39 & 40 Vict. c. 18, s. 4.)

Lost Wills.—A motion must be made for a grant of probate, or administration with the will annexed, of a lost will, as set out in a draft or copy, or as contained in an affidavit where the will itself was lost through no default of any party interested in the estate, and all parties consent to the application. (*Butts*, 2 E. & A. (Spinks) 58; *Barber*, 1 P. & D. 267.)

In the absence of consent the will, as set out in the

draft copy or affidavit, must be propounded. (*Burls* v. *B.*, 36 L. J. Prob. 125; 1 P. & D. 472.)

Proof of Lost Wills.—Lost wills may be proved by parol evidence to the extent to which the parol evidence goes. (*Sugden* v. *Lord St. Leonards*, 1 P. & D. 154; 45 L. J. Prob. 49.)

Presumption of Death.—Where the death of a person is capable of proof by presumption only, and the date of the death cannot be accurately stated in the affidavit to lead the grant, as where the presumption arises from a person's being last seen or heard of at a certain date or place, and from the circumstances attending his disappearance, or from his total disappearance for not less than seven years (*How*, 27 L. J. Prob. 37), or from the non-arrival at port in a reasonable time, or disappearance without any clue, of the vessel on which he shipped, application must be made to the Court on motion for leave to presume the death before the grant will be made. (*Main*, 1 S. & T. 11; 27 L. J. Prob. 4.)

Advertisements.—In these cases it is necessary, where the circumstances create a possibility of a reply (*Fairweather*, 2 S. & T. 589), to advertise for the deceased in the public press. Papers are selected which circulate in the locality where he would be likely to see them.

General Grants.—When a general grant is sought and the applicant has only an inferior title to the grant, and where the persons having the better title have not renounced, application must be by motion.

Creditors.—A creditor applying for a grant where there are parties interested must do so on motion.

Limited Grants.—A person entitled to a general grant who seeks only a limited one must apply for it on

motion. (See r. 30 P. R. Non-C. B.) Also for a grant limited to a particular subject. (See r. 29 P. R. Non-C. B.)

Grants de novo.—Where the original grant becomes inoperative from the incapacity of the grantee, as where he becomes a lunatic, a grant *de novo* can only be obtained on motion to the Court. (*Phillips*, 2 Adams, 35.)

Revocation of Grants.—A motion is necessary for a revocation of a grant where any parties interested do not consent, or at times an action.

Temporary Grants.—A motion is also necessary for a temporary grant to perform some special duty. (*Ruddy*, 2 P. & D. 330; 41 L. J. Prob. 63.)

Motions, Appeals.—There is an appeal from the judge's decision on motion (*Bloxam* v. *Favre*, 52 L. J. Prob. 43) to the Court of Appeal.

Grants under Special Powers.—All grants sought under the special powers of the Court (see C. P. A. 1857, s. 73) must be applied for by motion. In short, no special grant can be obtained as a general rule except on motion.

Grounds for this Application.—The grounds under sect. 73 upon which the Court exercises its special powers are—urgency, insolvency of the estate, or other special circumstances. (See the section.)

Observation.—Other cases coming under none of these heads may arise in non-contentious business, and also applications concerning the production of testamentary papers, but these will be found to include nearly all.

2. *Contentious Motions.*—The following probate rules apply to motions in contentious business:

"Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceedings before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and, briefly, the circumstances on which it is founded." (124 C. B.)

"If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars." (125 C. B.)

"On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the registry; or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the judge." (126 C. B.)

"Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the other parties to the suit who are entitled to be heard in opposition thereto." (127 C. B.)

There are also the Rules of the Supreme Court, 1883, under Ord. LII., which apply to all actions alike, probate included.

Summonses.—The rules relating to summonses in contentious business are found under Ord. LIV. and Supplement. If at variance with the following pro-

bate rules in relation to summonses they overrule them.

"A summons may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding." (98 C. B.)

"A printed form must be obtained and filled up with the object of the summons, and a proper fee stamp affixed. It must then be taken to the clerk of the papers, who will insert in the blank left in the printed form the time when the summons is to be made returnable, and get the summons signed by a registrar." (99 C. B.)

"The clerk of the papers is then to enter the name of the cause or matter and of the agent taking out the summons in the summons book, and return the summons (with the stamp cancelled), signed, to the applicant, who is to serve a copy on the party summoned. This copy must be served on the party summoned one clear day at least before the summons is returnable, and before 7 p.m. On Saturdays the copy of the summons is to be served before 2 p.m." (100 C. B.)

"On the day and at the hour named in the summons the party issuing the same is to present himself with the original at the judge's chambers." (101 C. B.)

"Both parties will be heard by the judge, who will make such order as he may think fit, and a note of such order will be made by the registrar in the summons book." (102 C. B.)

"If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit." (103 C. B.)

"An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion." (104 C. B.)

"If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the opposite party, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy. The clerk of the papers before giving out the order is to see that the proper stamp has been affixed to it, and is to cancel such stamp." (105 C. B.)

"If a summons is brought to the clerk of the papers, with a consent to an order indorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the judge: Provided that the order sought is in the opinion of the registrars one which, under the circumstances, would be made by the judge." (106 C. B.)

Audience on Summons and Motion.—Summonses in chambers are attended by counsel or solicitor, as the parties prefer, but motions are heard in Court, and are attended by counsel only.

Time of Hearing them.—Summonses before the registrars are heard at Somerset House upon days appointed by them.

Summonses before the judge are heard at the Royal Courts, in the judge's private room, on motion day,

generally on Tuesday: solicitors at 10.30, counsel at 11, motions at 11.30.

Testamentary Papers.—The Probate Division has power to order the attendance, for examination, of witnesses; to order the production of deeds, &c. (C. P. A. 1857, s. 24); and to enforce those orders (s. 25).

Withholding a Will.—No person has a right to keep a disputed will in his possession, and if, after notice, he still does so, he renders himself liable, under sect. 25, C. P. A. 1857, to the costs of proceedings for its production.

Subpœnas.—A subpœna may be issued against a person as a matter of course to deposit the will disputed in the registry, if he has it, or if it is under his control.

If it is not under his control, but in his knowledge in any way, he can be subpœnaed to attend for examination concerning it.

Production of Wills.—"Applications for an order for the production of papers or writings, purporting to be testamentary, may be made to the judge by motion, or by summons, when a suit is pending, and by motion upon affidavit when no suit is pending. If it can be shown that a testamentary paper is in the possession, within the power, or under the control of any person, a subpœna for the production of the same may be obtained by a registrar's order founded on an affidavit. Forms of subpœnas applicable to these cases are given, Nos. 21 and 22, and forms of præcipe, Nos. 23 and 24." (73 C. B.)

Registrars' powers.—The registrars have almost similar

powers to those already specified. (Under C. P. A. 1858, s. 23.)

Disobedience.—Disobedience to an order is punishable, after due notice, by attachment. (*Baigent* v. *B.*, 1 P. D. 421.)

Appearance to a Subpœna.—The time for appearance varies. The following rules direct the procedure on appearance:—

"Any person bringing in a will or testamentary paper, in obedience to a subpœna, is to take it in the first instance to the clerk of the papers, who will prepare a minute to be signed by the registrar to whom the will or paper brought in is to be delivered, and the registrar will sign the minute recording the delivery thereof." (84 P. R.)

"The minute is to be entered in the book of registrar's minutes in the usual manner; and the fee for entry, and a further fee for filing each testamentary paper, will then be payable. If these fees should not be paid by the person bringing in the will or paper, the same are to be charged to the person who may first apply to the clerk of the papers to make use of the will or paper so brought in. In case the person bringing in a will or testamentary paper may desire to have a voucher for its delivery into the registry, he may take an office copy of the minute on paying the usual fee for the same." (85 P. R.)

"Any person served with a subpœna to bring in a testamentary paper is at liberty to enter an appearance on payment of the usual fees, if he thinks fit to do so." (86 P. R.)

"The time fixed by a warning or citation for entering an appearance, or *by a subpœna*, to bring in a testa-

mentary paper, shall, in all cases, be exclusive of Sundays, Christmas Day, and Good Friday." (87 P. R.)

The student is also referred to Ord. XXXVII. R. S. C. 1883, rr. 26 to 37 inclusive.

Motions concerning the Production of Testamentary Papers.—These motions are—

1. For the production of papers purporting to be testamentary.
2. For an order for the examination in open court or on interrogatories of the person who has possession or knowledge of testamentary papers. (See sect. 26 C. P. A. 1857.)

Affidavits in Probate.—Affidavits are usually of two kinds, namely, to support application to the Court in—

(1) Non-contentious cases;
(2) Contentious cases.

Importance of Affidavits.—Affidavits are written depositions of much importance in probate proceedings. Every fact in non-contentious probate proceedings, made use of on application either in Court or chambers, must be sworn to, *i.e.* stated on affidavit. Much also of contentious procedure is carried on by affidavit.

Before whom Sworn.—Affidavits may be sworn before officers of the Probate Division (see J. A. 1873, ss. 77, 82) and commissioners generally, and before any specially appointed commissioners in the Isle of Man (C. P. A. 1858, s. 30); abroad (s. 31); in Scotland, Ireland, the Isle of Man, the Channel Islands, or anywhere out of England but within her Majesty's dominions (s. 32).

The rules applicable to the form, contents and *jurat* of an affidavit apply equally in the Probate Court as in

other Courts. The student is referred to Ord. XXXVIII. R. S. C. 1883.

Caveats.—A caveat is a caution, as the word implies, to the principal registry, or to the one in which the deceased died, to do nothing regarding the estate without notice to him, the person lodging it.

Who may lodge a Caveat.—Any one may lodge a caveat in relation to a deceased's estate, and thereupon a notice must be served upon him before any steps are taken to obtain either probate or administration.

The Object in lodging Caveats.—A caveat may be entered (in order subsequently to deny the jurisdiction of the Court)—

To protect a will or an estate from being dealt with;

To dispute a will or administration;

To give time for inquiries concerning the circumstances under which a will was made, or under which the deceased died, prior to applying to the Court for directions, or to the executor for information, before disputing the will;

And for other kindred purposes.

Probate Rules Non-C. B.—The following rules apply in relation to caveats:—

"Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor or attorney, enter a caveat in the principal registry, or in the proper district registry; if in the principal registry, the person entering the caveat must also insert the name of the deceased in the index to the caveat book." (59 P. R., 72 D. R.)

" A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and then expire and be of no effect; but caveats may be renewed from time to time." (60 P. R., 73 D. R.)

" The registrars, principal or district, shall, immediately upon a caveat being entered, send notice thereof, the former to the district registrar of any district in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death, and the latter shall do this also, and in addition send notice to the principal registrar." (61 P. R., 74 D. R.)

" No caveat shall affect any grant made on the day on which the caveat is entered, or on the day on which notice is received of a caveat having been entered in a district registry, or in the principal registry." (62 P. R., 75 D. R.)

The Heir-at-Law.—Caveats entered by the heir-at-law are irregular, and do not stop the proceedings. The heir-at-law cannot intervene without being cited, and, in common form, the grant does not affect him, unless he consents to it. Hence executors need not take any steps in contentious proceedings on the lodging of a caveat by the heir-at-law. (*Young* v. *Ferrie*, 4 S. & T. 210.)

The Warning.—The next step is a warning to the party lodging the caveat to enter an appearance at the principal registry, and to set forth his interest in the deceased's estate, otherwise the person warning the caveat will proceed to apply for probate or administration, as the case requires.

Warning Caveats.—Caveats should always be warned,

that it may be ascertained why they are entered. (See *Ming* v. *M.*, 36 L. J., Prob. 51.)

Rules as to Warnings.—"All caveats shall be warned from the principal registry. The warning is to be left at the place mentioned in the caveat as the address of the person who entered it." (63 P. R.)

"It shall be sufficient for the warning of a caveat that a registrar send by the public post a warning signed by himself, and directed to the person who entered the caveat, at the address mentioned in it." (64 P. R.)

"The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and, if such person claims under a will or codicil, is also to state the date of such will or codicil, and is to contain an address within three miles of the General Post Office, at which any notice requiring service may be left. The form of warning will be supplied in the registry." (65 P. R.)

Appearance to a Warning.—The person lodging the caveat may appear to the warning.

By Rule 1 all entries of appearance to citations and caveats, with a view to the commencement of contentious proceedings, shall set forth the name in full and the interest of the person or persons for whom the appearance is entered. (Rules in the Registry.)

Other rules follow not here necessary to mention.

By this appearance the names and addresses of the parties appear also, and their respective interest in the deceased's estate.

"After a caveat has been entered, the district registrar is not to proceed with the grant of probate or administration to which it relates, until it has expired or been

subducted, or until he has received notice from the principal registry that the caveat has been warned and no appearance given, or that the contentious proceedings consequent on the caveat have terminated." (77 D. R.)

Non-appearance to Warning.—The caveat is now cleared off in the following way:—

"In order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning, stating the manner of service and an affidavit of search for appearance and of non-appearance, must be filed." (67 P. R.)

Suits in relation to Realty.—The probate of a will is evidence of its validity in suits concerning realty, unless the will is disputed. (C. P. A. 1857, s. 64.)

Disputed Wills.—Disputed wills should be lodged in the principal registry for safe custody, pending the decision of the Court concerning them. (See *Cunningham* v. *Seymour*, 2 Phillim. 250.)

Attachments.—Attachments are writs to the sheriff to bring the persons named in the writ before the Court to answer for their contempt. (See Daniell's Chancery Practice, Attachments.)

When Issuing in Probate.—They issue both in contentious and non-contentious proceedings.

How obtained.—They are obtained on motion in cases under sects. 24 and 25 of C. P. A. 1857, and on motion or summons against parties to an action. They issue also under Ord. XLII., R. S. C. 1883, rr. 4 and 7, which see.

Application, how supported.—The application must be

supported by an affidavit of service of the judgment or order of the Court, for disobedience of which the attachment is sought; by an affidavit of non-compliance with the same, and one of service of notice of motion on the party or his solicitors on the record. (*Browning* v. *Sabine*, 5 Ch. D. 511.)

Costs.—The application must be inclusive of costs. If not applied for at the time, a subsequent application for them will be at the applicant's cost. (*Abud* v. *Riches*, 2 Ch. D. 529.)

The Debtors' Act.—Attachments under the Debtors' Act (32 & 33 Vict. c. 62, s. 5) must be by summons.

The Discharge.—Application for the defendant's discharge may be made to the judge, or, in his absence, to the registrar, on good cause shown, *e. g.*, irregularity in the proceedings, or that the contempt is cleared, or under sect. 4 of the Act.

Citations.—Citations are of two kinds:

1. In common form;
2. In suits.

Speaking generally, citations are official documents, issuing out of the principal registry only, under the seal of the Court, and signed by a principal registrar.

Object of Issue.—Citations issue upon various grounds; to call in a grant in common form pending a litigious inquiry concerning the estate to which it relates; to make the heir-at-law cognizant of proceedings affecting his interest in a probate suit; to call upon persons, better entitled, to take a grant, or renounce in the applicant's favour; and for numerous other purposes connected with probate proceedings.

Interest must be shown by Person extracting it.—Every one before extracting a citation must show on the affidavit to lead the citation the character in which he does it, and thereby the interest which justifies it.

"No citation is to issue under seal of the Court until an affidavit, in verification of the averments it contains, has been filed in the registry." (79 D. R., 68 P. R.)

"Citations are to be served personally when that can be done. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do." (79 D. R., 69 P. R.)

"Citations and other instruments which cannot be personally served are to be served by the insertion of the same, or of an abstract thereof, settled and signed by one of the registrars as an advertisement in such morning and evening London newspapers, and such local newspapers, and at such intervals as the judge or one of the registrars may direct." (79 D. R., 70 P. R.)

"No grants are to issue from a district registry after a citation without the production of an office copy of the decree or order of the judge or of one of the registrars of the principal registry authorizing the same." (80 D. R.)

A Caveat must precede the Citation.—"Before a citation is signed by the registrar a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates, and notice thereof shall be sent to the registrar of any district in which the deceased appears to have had a residence at the time of his death. Such caveat is to

be renewed from time to time, so as to be kept in force so long as the proceedings arising from the service of the citation are pending. This rule is not to apply to citations to exhibit an inventory, and to render an account, nor to citations to show cause why a bond should not be assigned in order to its being enforced against the sureties." (15 C. B.)

Parties cited.—A party cited to see proceedings in an action is entitled to a delivery of a statement of claim and counter-claim that he may make what answer he thinks fit to either.

Consent.—Citations are unnecessary upon consent, in common form. (*Barber*, 1 P. & D. 267.)

Issue of Grant.—If the proceedings terminate amicably the grant will follow, after expiration of the notice of application, either in the district or principal registry.

Citing the Heir-at-Law.—The heir-at-law must be cited to see proceedings under a will where he is interested in the estate.

Administrators and Receivers pendente lite.—In any contentious probate proceedings the Court may appoint an administrator of the personal estate (C. P. A. 1857, s. 70) and a receiver of the realty (s. 71) pending suit, "on the ground that while the suit is pending there is no one legally entitled to receive or hold the assets or give discharges." (*Bellew* v. *B.*, 4 S. & T. 58.)

Practice.—In practice unless the estate would suffer from the absence of one or the other, they are not appointed, that the expense to the parties may be diminished.

Duties of Administrator pendente lite.—The administrator *pendente lite* is an officer of the Court, under the terms of the decree appointing him (*Charlton* v. *Hindmarsh*, 1 S. & T. 519), and he holds the property till the suit terminates. He must then pay over everything to the party entitled, and the Court is bound to take care he discharges his duty till the suit closes. (*Graves*, 1 Hagg. 313.)

CHAPTER VI.

CONTENTIOUS PROCEEDINGS.

Contentious business in probate relates wholly to probate actions and matters incidental to them.

Interpretation of Term.—"Probate actions" include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business. (Ord. LXXI.)

Probate Grants in Solemn Form.—The fundamental distinction between grants of probate or administration in common form, and in solemn form or contention, is, that the former are not binding, if disputed, but the latter are, with one exception—when such fresh facts come to the knowledge of either party as render the grant already made after litigation ineffectual to carry out the testator's wishes, or which prove that the wrong party has been constituted personal representative of the deceased.

Probate Actions.—Probate actions are of three kinds:

1. Actions for proving wills in solemn form. The question in these actions may be, whether a former or a later will is the last valid will of the testator; whether he was of testamentary capacity when he made what purports to be his last will; whether it was duly executed according to the requirements of the Wills Act of 1837; whether it was obtained by undue influence, and other kindred questions. These are *will* cases.

2. Administration actions, or what were till recently called interest suits, in which the plaintiff claims administration as next of kin, and his interest as such is disputed.

3. Actions by an executor or legatee of a former or later will, or by a next of kin, &c., to obtain revocation of a probate granted in common form or contention; or by an executor or legatee of a will, when letters of administration have been granted as under an intestacy.

"All actions which previously to the commencement of the principal Act were commenced, *inter alia*, by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action." (R. S. C. 1883, Ord. I. r. 1.)

County Court Jurisdiction.—County court probate jurisdiction is governed by the Probate Act of 1857, ss. 55, 56, 57, 58, 59; C. P. A. 1858, ss. 10, 12.

For the limit of property in county court probate actions, see *ante*, pp. 48 and 83.

Place of Trial—Small Estates.—Parties may try their probate actions locally subject to this limit, but they are not obliged to do so unless ordered by the judge above. (*Dunn* v. *Dunn*, 1 S. & T. 521.)

County Court Appeals.—Probate county court appeals must be to a divisional court of the Probate Division. (J. A. 1873, s. 45; R. S. C. 1883, Ord. LIX. r. 4.)

Probate Actions, where Tried.—Probate actions are tried in the Probate Division. (Ord. II. r. 1; and see J. A. 1873, s. 34.)

How commenced.—Probate actions are now commenced by writ, and carried on similarly to ordinary actions.

Hence attention need only be drawn to such rules as apply specially to probate actions.

Indorsement of Writ.—"In probate actions the indorsement shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character." (Ord. III. r. 5.)

Verifying Affidavit.—"The issue of a writ of summons in probate actions shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the writ." (Ord. V. r. 15.)

Writ.—"In probate actions service of a writ of summons or notice of a writ of summons may, by leave of the Court or a judge, be allowed out of the jurisdiction." (Ord. XI. r. 3.)

Appearance.—"In probate and admiralty actions notice of appearances entered shall forthwith be given by the Central Office to the probate and admiralty registries respectively." (Ord. XII. r. 3.)

Interveners.—"In probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased." (Ord. XII. r. 23; *Jones* v. *Williams*, 34 L. J., Prob. 102.)

Parties.—"Subject to the provisions of the Acts and these rules, in all probate actions the rules as to parties in use in the Court of Probate previously to the commencement of the principal Act, shall continue to be in force." (Ord. XVI. r. 10.)

Procedure.—The Probate Court treated the rules and orders relating to its procedure "as intended for the

general guidance of the business in the registry, and capable of modification by the Court, if sufficient reason were shown for departing from them." (*Loftus*, 3 S. & T. 311; 33 L. J., Prob. 59.) This would doubtless apply now, but the emergency, to which no rule refers under the Judicature Acts, will probably be of rare occurrence.

Proof in Solemn Form, when requisite.—Parties interested can insist upon having a will proved in open Court, or probate in solemn form. They may be interested under an intestacy, or more interested under an intestacy than under the will, in which case they can insist on a public inquiry into the validity of the will. (*Meryweather* v. *Turner*, 3 N. C. 59.)

Executors may not Dispute the Will.—An executor may not dispute the will. He need not prove it, but he cannot disprove it. (*Chamberlain*, 36 L. J., Prob. 52.)

Practice—Citing the Heir-at-Law.—Where a will of personalty affects realty also, the heir-at-law must be cited before a receiver *pendente lite* is appointed.

Rights of Creditors.—A creditor may not oppose a will. His interest is only in probate, or administration of the estate, that his debt may be paid. If no person having right or interest as next of kin comes forward, he may claim under his pecuniary interest. (See *Menzies* v. *Pulbrook*, 2 Curt. 845; 1 N. C. 132; *Elme* v. *Da Costa*, 1 Phillim. 173; *Dabbs* v. *Chisman*, 1 Phillim. 155.)

Parties.—The existing rules as to parties (R. S. C. 1883) are applicable to probate actions, care being taken not to disregard Ord. III. r. 5.

Delivery of Claim.—"In probate actions the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default; but where the defendant has appeared the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts." (Ord. XX. r. 2; *Dymond* v. *Croft*, 3 Ch. D. 512; *Morton* v. *Miller*, *ibid.* 516, on appeal.)

The Statement of Claim.—The statement of claim must contain shortly allegations of the facts necessary for proof and already disclosed in the affidavit verifying the writ.

Revocation.—Claims for revocation of grants require to be drawn somewhat differently, according to the circumstances of the case.

Scripts.—Scripts, as distinguished from documents, are testamentary papers of the deceased. Documents are any papers other than the above which are material to the suit.

Interest Causes.—"In probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest." (Ord. XX. r. 9. See *Medcalf* v. *James*, 25 W. R. 63, Prob. Div.)

"In interest causes, as heretofore, each party shall be at liberty to deny the interest of the other; and in such cases both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial of their interests respectively." (61 C. B.)

"In interest causes the pleading of each party must

show on the face of it that no other person exists having a prior interest to that of the claimant." (62 C. B.)

Pleas in Probate.—The following pleas are raised, all or some of them, as the case requires:—

Revocation; Undue execution; Marriage; Unsoundness of mind, memory and understanding at the time of execution; Undue influence; Fraud; That at the time of execution the testator did not know and approve of the contents of the will; That he made his true last will on *such a date*, and appointed the defendant *sole executor* thereof. Then follows the claim, whatever it may be.

Pleas other than these are occasional and framed according to the circumstances of the case.

Costs.—"In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances, according to the practice of the Court of Probate, before the principal Act came into operation." (Ord. XXI. r. 18.)

Default.—"In probate actions, if any defendant make default in filing and delivering a defence, the action may proceed, notwithstanding such default." (Ord. XXVII. r. 10.)

Parties opposing Will, when liable for Costs of Probate.—Parties opposing a will are entitled to have it proved in solemn form, and to cross-examine the wit-

nesses called in support of it, without incurring liability for costs of probate, provided they give notice of their intention to do so when pleading that the ordinary statutory formalities (Wills Act, 1837, s. 9) have not been complied with.

If they set up any additional pleas by raising questions not within the statute, such as undue influence and fraud, they render themselves liable for costs if their case fails. (*Farlar* v. *F.*, 27 L. J., Prob. 103.)

Discovery and Inspection.—The object of discovery is—1. To ascertain matters material to the action known to the other side and not known to the party applying for discovery. 2. To obtain admissions which will obviate the trouble and expense of proof. 3. To ascertain what is the case for the other side.

Trial.—Probate actions are tried either in the local county court, if the estate is not over the statutory limit (see *ante*, County Court Jurisdiction, p. 83), or in the Probate Division.

Evidence.—The ordinary rules of evidence apply to probate actions.

Executor.—No person shall, because he is an executor of a will, be incompetent as a witness of its execution or as a witness regarding its validity or invalidity. (1 Vict. c. 26, s. 17.)

Where the executor takes an interest under it, he must, in order to give evidence as a witness, abandon that interest. (*Munday* v. *Slaughter*, 2 Curt. 76.)

Gifts to attesting Witnesses or their Wives or Husbands are void.—The Wills Act, in sect. 15, makes gifts to attesting witnesses, or to their husbands or wives, void; but it does not invalidate the attestation.

Creditors as attesting Witnesses.—Creditors, or their wives or husbands, may attest, as debts are not gifts (sect. 16). But though, as already pointed out, executors may attest, if they take anything under the will they come under sect. 15, as attesting witnesses receiving gifts, therefore they must be careful not to attest if they would keep their legacy.

Witnesses to Prove the Will.—A person propounding a will is not bound to call both the attesting witnesses. If the evidence of one suffices, as it generally does in the absence of contention, the calling of the other is a matter for the discretion of the party propounding the will. (*Belbin* v. *Skeates*, 27 L. J., Prob. 56; *Foster* v. *F.*, 33 L. J., Prob. 113.)

Sufficiency of Evidence to Prove a Will.—One witness suffices, if corroborated, usually, though the other disagrees. (*Farmer* v. *Brock*, Deane & Swabey, 189.) But the evidence of one witness alone, unsupported by any circumstances of corroboration, must be beyond suspicion. (*Theakston* v. *Marson*, 4 Hagg. 314; *Evans* v. *E.*, 1 Robert. 173.)

Ambiguities in Wills.—An ambiguity on the face of a will may be explained by parol evidence (*Nickalls*, 34 L. J., Prob. 103), as where a testator appoints his "said nephew" executor of his will, and he has two nephews. This is a doubtful or ambiguous appointment, and may be explained by evidence. (*Grant* v. *G.*, 39 L. J., Prob. 17.)

Distinction between Patent and Latent Ambiguities.—A patent ambiguity is one which admits of no explanation, as a legacy to Mr. —— (*Baylis* v. *Att.-Gen.*, 2 Atk. 239), or to Lady ——. (*Hunt* v. *Hort*, 3 Bro. C. C.

311.) No testimony, however strong, can explain these ambiguities, hence they are patent. But if there are any words to which a reasonable meaning may be attached, evidence may be given to show what that meaning is. Thus a legacy to "Mrs. C." admits of explanation. It may be shown that the testator always spoke of a certain person as "Mrs. C." If so, the ambiguity is explained, and hence only latent. (*Abbott* v. *Massie*, 3 Ves. 148; *Clayton* v. *Lord Nugent*, 13 M. & W. 207.)

Destroyed Wills.—If a duly-executed will is destroyed in the lifetime of the testator, without his authority (*Trevelyan* v. *T.*, 1 Phill. 153), or lost (*Vallance* v. *V.*, 1 Hagg. 694), it may be established upon satisfactory proof of such destruction or loss, and of its contents.

New Trial.—"Every motion for a new trial or to set aside a verdict, finding or judgment, shall be made in every cause or matter by the principal Act assigned to the Probate, Divorce and Admiralty Division, where there has been a trial thereof or of any issue therein with a jury, to a Divisional Court of that Division, one of the judges of which shall (when practicable) sit on the hearing of such motion." (Ord. XXXIX. r. 1.)

New Trials in County Courts.—When either party desires a new trial in the County Court, appeal should be made to the Probate Division, under sect. 58, C. P. A. 1857, on questions of law and admissibility of evidence; but on questions of fact the County Court jurisdiction is exclusive. (*Lealley* v. *Veryard*, 35 L. J., Prob. 127; 1 P. & D. 195.)

Costs.—"When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues

respectively, both in law and fact, shall, unless otherwise ordered, follow the event." (Ord. LXV. r. 2.)

"If a cause be removed from an inferior Court, having jurisdiction in the cause, the costs in the Court below shall be costs in the cause." (Ord. LXV. r. 3.)

"Executors or other parties who, previously to the passing of the 'Court of Probate Act, 1857,' might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities, and effect as heretofore." (4 C. B.)

These rules suggest the order in which questions of costs present themselves.

Generally, an executor may take his costs of probate out of the estate; also, a legatee *loco executoris* may, as administrator, charge for the necessary costs of probate. (*Sutton* v. *Drax*, 2 Phillim. 323.)

Testator's capacity doubtful.—Where the testator's capacity is doubtful, the costs of propounding his will come out of the estate, whether the will is established or set aside. It is proper that the will should be propounded and the doubt cleared up, and of course at the cost of the estate. (*Boughton* v. *Knight*, 3 P. & D. 77.)

The Executor's Liabilities.—An executor will not get his costs out of the estate where he has not exercised reasonable care in ascertaining if the litigation was warranted by the facts of the case. (*Dean* v. *Russell*, 3 Phillim. 334.)

Next of Kin's Costs.—"Next of kin and others who, previously to the passing of the said Act, had a right to put executors, or parties entitled to administration with

will annexed, upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs, as heretofore." (5 C. B.)

A next of kin is entitled to raise the questions under the Wills Act (sect. 9) of due execution and capacity, and is not liable for costs if he calls no witnesses; nor, if he does call them, upon reasonable grounds for so doing. (*Summerell* v. *Clements*, 3 S. & T. 35.)

Notice as to Costs.—A conditional notice of intention to cross-examine only the attesting witnesses protects the parties opposing a will from costs, under Ord. XXI. r. 18 (1883).

In such a case the only pleas admissible with the notice are traverses of the allegation raised in obedience to the Wills Act (sect. 9).

Creditor's Costs.—A creditor who is administrator may oppose a will without liability to costs. (*Dabbs* v. *Chisman*, 1 Phillim. 160, n.)

Interveners.—"Parties who, previously to the passing of the said Act, had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore." (6 C. B.)

The intervener's privileges and liabilities are similar to those of other defendants. Where he does not cause costs he will not have to pay them; but where he does not justify his opposition, he will have to pay his own costs and perhaps those of the plaintiff.

The Heir-at-Law.—The heir-at-law is liable to costs to the same extent as the next of kin. (*Fyson* v. *Westrop*, 1 S. & T. 279.)

Costs generally.—The principle which always guides the Court in giving costs out of the estate is that the party was led into the contest by the state in which the deceased left his papers. (*Hillam* v. *Walker*, 1 Hagg. 74.)

The residue has to bear the costs when they are ordered to come out of the estate.

In all other contentious matters the rules applying to all actions indiscriminately apply to those in probate also.

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